TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 432.

J. H. HODGES, NICK HOFFMAN, WALTER ANDERSON, *ET AL.*, &c., PLAINTIFFS IN ERROR,

vs.

G. T. SNYDER, C. W. WALKOW, A. O. WALKOW, *ET AL.*, AS MEMBERS OF THE BOARD OF EDUCATION OF THE PURPORTED CONSOLIDATED SCHOOL DISTRICT NAMED AND KNOWN AS ERWIN INDEPENDENT CONSOLIDATED SCHOOL DISTRICT No. 1 OF KINGSBURY COUNTY, SOUTH DAKOTA, *ET AL.*, &c., *ET AL.*

IN ERROR TO THE CIRCUIT COURT OF KINGSBURY COUNTY, NINTH JUDICIAL CIRCUIT, OF THE STATE OF SOUTH DAKOTA.

FILED JUNE 14, 1922.

(28,982)

(28,982)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 432.

J. H. HODGES, NICK HOFFMAN, WALTER ANDERSON, *ET AL.*, &c., PLAINTIFFS IN ERROR,

vs.

G. T. SNYDER, C. W. WALKOW, A. O. WALKOW, *ET AL.*, AS MEMBERS OF THE BOARD OF EDUCATION OF THE PURPORTED CONSOLIDATED SCHOOL DISTRICT NAMED AND KNOWN AS ERWIN INDEPENDENT CONSOLIDATED SCHOOL DISTRICT No. 1 OF KINGSBURY COUNTY, SOUTH DAKOTA, *ET AL.*, &c., *ET AL.*

IN ERROR TO THE CIRCUIT COURT OF KINGSBURY COUNTY, NINTH JUDICIAL CIRCUIT, OF THE STATE OF SOUTH DAKOTA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 6, 1922.

1&2 STATE OF SOUTH DAKOTA,
County of Kingsbury, ss:

In Circuit Court, Ninth Judicial Circuit.

J. H. HODGES, NICK HOFFMAN, WALTER ANDERSON, E. H. ACKLEY, C. R. Lewis, and H. M. Muser, on Behalf of Themselves and of All Other Electors and Taxpayers Similarly Situated, Plaintiffs,

vs.

G. T. SNYDER, C. W. WALKOW, A. O. WALKOW, C. J. NOYES, and J. W. Earl, as Members of the Board of Education of the Purported Consolidated School District Named and Known as Erwin Independent Consolidated School District #1 of Kingsbury County, State of South Dakota, and C. A. Jepson, Clerk, and J. W. Kruger, Treasurer, of Said Pretended Consolidated School District, and M. L. McCarty, County Suprintendent of Schools of Kingsbury County, South Dakota, Defendants.

Summons.

The State of South Dakota to the above named defendants, Greetings:

You are hereby summoned and required to answer the Complaint of the plaintiffs in the above entitled action, a copy of which is hereto annexed and herewith served upon you and to serve a copy of your Answer thereto upon the subscribers at their office in the City of Brookings, in said County of Brookings and State of South Dakota within thirty (30) days after the service of this Summons upon you, exclusive of the day of such service, and

You are hereby notified that if you fail to answer said complaint within said time, plaintiffs will apply to the Court for the relief demanded in their complaint herein.

Dated at Brookings, South Dakota this 7th day of June 1919.

HALL & PURDY,
Attorneys for Plaintiffs.

Brookings, South Dakota.

Filed in the office of the Clerk of the Circuit Court in and for Kingsbury County, S. D. this 5th day of July, A. D. 1919 and recorded in Book No. — of —, page —.

H. J. HAMILTON,
Clerk of the Circuit Court.

3 STATE OF SOUTH DAKOTA,
County of Kingsbury, ss:

In Circuit Court, Ninth Judicial Circuit.

J. H. HODGES, NICK HOFFMAN, WALTER ANDERSON, E. E. ACKLEY, C. R. LEWIS, and H. M. MUSER, on Behalf of Themselves and of All Other Electors and Taxpayers Similarly Situated, Plaintiffs,

vs.

G. T. SNYDER, C. W. WALKOW, A. O. WALKOW, C. J. NOYES, and J. W. Earl, as Members of the Board of Education of the Purported Consolidated School District Named and Known as Erwin Independent Consolidated School District #1 of Kingsbury County, State of South Dakota, and C. A. Jepson, Clerk, and J. W. Kruger, Treasurer, of Said Pretended Consolidated School District, and M. L. McCarty, County Superintendent of Schools of Kingsbury County, South Dakota, Defendants.

Complaint.

The plaintiffs above named, for and on behalf of themselves and of all other legal electors and taxpayers, similarly situated, complain and allege:

I.

That the plaintiff, J. H. Hodges, is a resident, elector and taxpayer in school district #50 in said County of Kingsbury and that said plaintiff Nick Hoffman, is a resident, elector and taxpayer in school district #35 of said County; that the plaintiff Walter Anderson is a resident, elector and taxpayer in school district #31 of said County; that the plaintiff E. E. Ackley, is a resident, elector and taxpayer in school district #34 of said County ; that the plaintiff C. R. Lewis, is a resident, elector and taxpayer in school district #33 of said County and that the plaintiff H. M. Muser is a resident, elector and taxpayer in school district # 32 of said County and that they and each of them were such residents, electors and taxpayers at all of the times hereinafter mentioned; that there are numerous other residents, electors and taxpayers in school districts #31, #32, #33, #34, #35 and #50 of said County of Kingsbury and State of South Dakota, who together with these plaintiffs protest against the proposed consolidated school district and the issuance of Bonds hereinafter mentioned for and on behalf of whom this action is brought, in number
4 to exceed 100. That the defendants, G. T. Snyder, C. W. Walkow, A. O. Walkow, C. J. Noyes and J. W. Earl claim to be and are acting as members of the Board of Education for said pretended Erwin Consolidated school district #1 of Kingsbury County, the said G. T. Snyder pretending to be and acting as President of said Board of Education of Erwin Independent Consolidated School District #1 of Kingsbury County, South Dakota and that

the said defendant C. A. Jepson, pretends to be and is acting as Clerk thereof and the said defendant, J. W. Kruger as Treasurer thereof and that the said defendant, M. L. McCarty is the County Superintendent of Schools of said County of Kingsbury and State of South Dakota.

II.

That the Erwin Independent School District #33 of said County of Kingsbury includes the City of Erwin and has a population of over three hundred persons; that school districts #31, #32, #34, #35, and #50 are rural school districts adjoining said Independent school district of the City of Erwin and have a comparatively small population, there being no town, village or City within any of said last named school districts; that the entire area included in the proposed consolidated school district above mentioned includes more than a congressional township and contains all except one and one fourth (1¼) sections of the Township 112, North of Range 55 in said County of Kingsbury and includes section- 2, 3, 4, 5 and 6 of — Township 111, Range 55 in said County of Kingsbury; that the location of the proposed consolidated school building for said pretended consolidated school district is in the City of Erwin which is located on the S. W. Quarter of Section 21, Township 112 Range 55 in said County of Kingsbury and State of South Dakota.

III.

That during the months of March and April 1919 certain proceedings were had for the formation of a consolidated school district as above set forth and certain Petitions for the formation thereof were circulated and signed by certain electors and others pretending to be electors in the said school districts, praying for the formation of such consolidated school district, and an election for that purpose was held in the said City of Erwin on the 8th day of April 1919 and that on the 16th day of April 1919, the defendant M. L. McCarty, County Superintendent of Schools of Kingsbury County, South Dakota made a purported Order in the following words and figures, to-wit:

"Whereas an election was held on the 8th day of April 1919 by the electors of School districts Nos. 31, 32, 33, 34 and 50 in the County of Kingsbury and State of South Dakota, for the purpose of voting upon the question of the consolidation of the said districts, as provided by Chapter 194, of the Session Laws of 1913, and laws amendatory thereto, and in accordance with a plan approved by the State Superintendent of Public Instruction, and it appears from the certified returns of said election that there were 273 votes cast at said election upon said question, of which three-fifths or more were for consolidation, to-wit: 193 votes for consolidation and 80 votes against consolidation, it is hereby Ordered that the said districts 31, 32, 33, 34 and 50 as designated in the plan approved for this consolidation be consolidated as provided by said Chapter 194 of the Session laws

of 1913, and laws amendatory thereto, and that the title of said consolidated district shall be Erwin Independent Consolidated District Number One of Kingsbury County, South Dakota. Given under my hand and the seal of the County Superintendent of Schools of Kingsbury County, South Dakota this 16th day of April 1919."

That said Order is null and void and that the said pretended consolidated school district was not created by vote of the electors at said election for the following reasons: (*a*) That Petitions were not signed by, at least, 25% of the electors of each District affected by said proposed consolidation, qualified to vote at school meetings, or presented to the said County Superintendent of Schools of Kingsbury County asking for the formation of a consolidated school district in accordance with a plan approved by the Superintendent of Public Instruction and that on the contrary, in at least two of said school districts affected by said proposed consolidation, to-wit: School districts #34 and #35 the purported Petitions signed and acted upon in said proceedings were fatally defective and insufficient in the following particulars: That at the time of the signing of the said Petition of electors of school district #34 there were, at least, 23 legal, qualified electors in said school district #34, qualified to vote at school meetings and that the said pretended Petition, so presented and acted upon, contain the signatures of only four of the legal electors of said school district, which did not constitute 25% of the electors of said district; that H. J. Holten and Mrs. H. J. Holten, who signed said Petition, were not at the time of signing the
6 same, qualified electors in said school district; that the affidavit made by one C. A. Jepson, concerning the signers to said Petition is in the words and figures as follows, to-wit:

"I, C. A. Jepson, being first duly sworn on oath state that each of the persons whose names are affixed to the above and foregoing paper signed the same personally and added thereto his or her place of residence, postoffice address, and date of signing; that to the best of my knowledge and belief each and all of said persons are legally qualified to sign said petition, and each signed said petition with full knowledge of its contents."

That said affidavit does not allege that said C. A. Jepson circulated said Petition and that the statements therein contained to the effect that each of the signers "added thereto his or her place of residence, postoffice address, and date of signing" is untrue as appears upon the face of said Petition.

(*b*) That the purported Petition signed by purported electors of school district #35 as aforesaid, is fatally defective and insufficient in that at the time of signing said Petition there were at least 28 legal electors qualified to vote at school elections in said district #35 and that said Petition was not signed by 25% thereof; and that there were two signers to said petition, namely, Hazel J. Tyrrell and Anton M. Tyrrell who were not at that time qualified electors therein, and that to the best of the plaintiffs' knowledge, information and belief, one

George Carlsen, who signed said Petition was not at the time a qualified elector therein. That the affidavit of one H. C. Halla endorsed upon said Petition fails to allege that he circulated said Petition or had personal knowledge of the matters therein stated concerning the signatures or qualifications of the Petitioners.

(c) That the said election held April 8, 1919 was null and void and failed to express the wishes of the various school districts outside of the said school district #33 containing the City of Erwin, and was unfairly conducted in the following respects:

(a) That all the officers conducting said election were residents and citizens of the said City of Erwin. (b) That the electors of said City of Erwin, a thickly populated district, forced the result of said election upon the said outlying rural districts against the will and without the consent of the latter and of the majority of the electors thereof, by reason of the greater number of electors in said
7 City of Erwin and that the Statutes of this State concerning consolidated schools do not contemplate that a City can thus forcibly annex rural territory and erect a large and expensive school building in the City at the expense of said rural districts and compel the scholars in such rural districts to attend school in such City, going in many instances in the district complained of herein, a long and unreasonable distance to school and to be subjected to great inconvenience. (c) That the persons circulating the Petitions and promoting the said proposed consolidated school district and conducting the said election held April 8, 1919 were largely, if not entirely, citizens and electors of the said City of Erwin and by reason of their selfish interests, superiority of numbers, the electors of said rural districts were rendered helpless to protect themselves, their interests and the welfare of the children of school age of said rural districts in said proceedings. (d) That at the date of said election, the roads by reason of excessive rains, were in a practically impassable condition thereby preventing a large number of electors of said rural districts to attend said election.

(e) That the persons promoting said election and said proposed consolidation, fraudulently procured various persons to vote at said election in favor of said consolidation, who were not qualified to do so and in a manner not authorized by law, some of the particulars in relation to which are as follows: That one Lester Munger, a resident of said City of Erwin on the date of said election was sick in bed and did not attend the polls or meeting but that according to the best of plaintiffs knowledge, information and belief, the officers of said election permitted him to vote by signing a paper and counted his ballot in favor of said consolidation, and that one Mrs. Jane Barker and Mrs. Sam McGriff likewise were permitted to vote in the same manner in favor of said consolidation without being personally present at said meeting, and that their votes were so counted; also that at least three school teachers in the said City of Erwin voted at said election in favor of consolidation and the voters were not qualified electors of any of said districts, namely: Lillian Hinz, Miss

Anble and Miss Jones, and that one H. J. Holten and Mrs.
8 Holten and John Paulson and Mrs. John Paulson and one Chris. Harryop and one John Ludwig, who were not qualified electors in any of said districts were so solicited to and did vote at said election and their votes were counted in favor of said consolidation. That to the best of plaintiffs knowledge, information and belief, the ballots used at said election or the record of the votes were not transmitted to or kept on file by the County Superintendent of Schools of Kingsbury County, South Dakota and that these plaintiffs have not been able to ascertain the whereabouts of the same or to inspect the same and allege on information and belief that an examination thereof would disclose other irregularities showing that said election was not fairly or properly conducted and would not justify the certificate and Order above quoted made by the County Superintendent of Schools of Kingsbury County.

IV.

That for the reasons above mentioned the said proceedings for creating said alleged Erwin Independent Consolidated School District #1 of Kingsbury County, South Dakota, are null and void and that no such school district in fact or in law is in existence and that said defendants acting as pretended officers thereof are so acting without legal right or authority.

V.

That in the months of May and June 1919, certain proceedings were had by the said alleged officers of said Erwin Independent Consolidated School District #1 of Kingsbury County, South Dakota, for the issuance of Bonds for the sum of $97,000.00 for the purpose of purchasing a school site in the said City of Erwin and erecting a school building thereon, which said Bonds are intended to constitute an obligation against each and all of said independent school districts #31, #32, #33, #34, #35 and #50 of Kingsbury County, South Dakota and upon the taxpayers therein; and that on the 4th day of June, 1919, an election was held in said City of Erwin for that purpose and that it has been declared by the officers of said election, that a sufficient numbers of votes were cast
in favor of said proposition for issuing Bonds to justify the
9 issuance of same and that unless enjoined from so doing, the said defendants and all persons acting by, through and under them will issue such Bonds and thereby create an apparent obligation against the property of these plaintiffs and others similarly situated without authority or law, and that they will proceed to purchase a site for a school building in said City of Erwin and to erect a large and expensive school building thereon at the expense of these plaintiffs and others similarly situated and without authority of law; that in addition to the reasons above mentioned for the establishment and creation of said alleged Erwin Independent Consolidated School District #1 of Kingsbury County, South Dakota, the

said proceedings for the issuance of said Bonds and creation of said liability against these plaintiffs and their property the said proceedings are null and void for the following reasons, to-wit: (*a*) That there is no law or statute of this State now in force authorizing the issuance of Bonds, sought to be issued herein, by consolidated school districts. (*b*) That the proceedings for the holding of said election were irregular and void and that the election at which said question was voted upon held at the City of Erwin June 4, 1919, was improperly and irregularly held. (*c*) That the said persons promoting said scheme for consolidating said school districts caused notices to be posted on two prior occasions for the holding of an election for issuing said bonds, in one of which the date set for the election was May 27, 1919, and in another May 29, 1919, and then followed the call for the election June 4, 1919; that the giving of said several notices and the abandonment of the first two elections called, caused confusion and uncertainty to exist in the minds of the electors of the said several school districts and thereby prevented a large number of the legal voters thereof from attending at said election of June 4, 1919. (*d*) Persons purporting to be electors, but were not so qualified, voted in favor of the issuance of said Bonds. (*e*) That by reason of excessive rains the roads in the rural districts were practically impassable and that many electors interested were unable to participate in said election. (*f*) That said proceedings including said election were dominated and controlled by citizens and electors of the said City of Erwin, who were enabled thereby to out vote the said rural districts and to impose said obligation upon them against their will and without their consent and without authority of law. (*g*) That no proper or sufficient petition or petitions signed by one-third of the voters resident in the said proposed consolidated school district was signed or presented nor was any Petition signed or presented to said Board signed by one-third of the voters resident of said alleged consolidated school district. (*h*) That, in at least two of the said districts comprising said alleged consolidated school districts, to-wit: District #50 and District #32, the only notices posted were posted on Sunday the 25th day of May 1919 and said notices *filed* to state time in which said Bond shall be made payable, and that the amount of said Bonds, so proposed to be issued, is in excess of the amount of $4,500.00 for one school house as provided by sections 151, 152 and 153 of Chapter 135 laws of South Dakota of 1907 and Acts Amendatory thereof. (*i*) That at the said election held June 4, 1919 various persons voted in favor of said bonds and their votes counted, who were not qualified electors, but that the exact number of such disqualified electors is to these plaintiffs unknown and that they are unable to ascertain the same by reason of the fact that they are unable to obtain access to the ballots or poll books used in said election. That $97,000.00 is a sum largely in excess not only of the statutory limitations for expense of school building for consolidated school districts, but is also largely in excess of the requirements of the consolidated school from said school districts and the excess thereof is designed by the promoters of said scheme for consolida-

tion and the issuance of Bonds, to inure to the benefit of the said City of Erwin and to furnish a large and expensive school
11 building for the benefit of said City of Erwin which school would be inaccessible to and inconvenient for the scholars living in the said rural districts and not adapted to their needs nor in substantial compliance with the intent and purpose of the laws of this State concerning consolidated schools.

That plaintiffs have no plain, speedy or adequate remedy at law in the premises and that they have thus united in this equitable suit in order to avoid a multiplicity of actions and that unless the Court shall enjoin further proceedings on the part of these defendants and the said purported consolidated school district and all persons acting by, through or under them from proceeding to the establishment of said purported consolidated school district, the erection of said school building and the issuance of said Bond, that a great hardship will be perpetrated upon these plaintiffs and taxpayers, similarly situated, and their property unlawfully subjected to said obligations and liability, and that they will be deprived of existing schools and school facilities for the education of their children.

Wherefore plaintiffs pray the Court to enjoin the said defendants and all persons acting by, through or under them in any manner, both temporarily and permanently from proceeding further as a consolidated school district and from, in any manner, assuming or undertaking to assume that said alleged Erwin Independent Consolidated School District #1 of Kingsbury County, South Dakota is in fact or in law a consolidated school district and from, in any manner, interfering with the conduct of the said school districts #31, #32, #34, #35 and #50 and the maintenance of schools therein and from purchasing any site or erecting any school building for said purported consolidated school district and from issuing said Bonds for the sum of $97,000.00 or any bonds whatsoever purporting to be the obligations of said alleged Erwin Independent Consolidated School District #1 of Kingsbury County, South Dakota and
12 from advertising for bids therefor and from selling the same and for such other and further relief in the premises as to the Court may seem just and equitable and for costs and disbursements of this action including reasonable amount of counsel fees.

Dated at Brookings, South Dakota, this 7th day of June, 1919.

HALL & PURDY,
Attorneys for Plaintiffs.

Brookings, South Dakota.

(Verification by J. H. Hodges.)

13 (Title in Circuit Court.)

Demurrer.

Come now the defendants and enter a general demurrer to plaintiff's complaint as follows:

I. That the Court did not and does not have jurisdiction of the subject of the action.

II. That the plaintiffs have no legal capacity to sue and that there is a defect of parties plaintiff.

III. That the complaint does not state facts sufficient to constitute a cause of action.

IV. That several causes of action have been improperly united.

V. That there is a defect of parties defendant.

Dated at Huron, Beadle County, So. Dak. this 1st day of July, A. D. 1919.

(Signed) NULL & ROYHL,
Attorneys for the Defendants.

Huron, Beadle County, South Dakota.

14 (Title in Circuit Court.)

Order.

The above matter coming on to be heard upon the Demurrer of the defendants to the plaintiff's complaint and said motion having been formally argued and presented to the Court at De Smet, South Dakota, on August 11, 1919, plaintiffs appearing in person and by their Attorneys Hall & Purdy, in opposition to said Demurrer and the defendants appearing in person and by their Attorneys, Null & Royhl, in the support of said Demurrer and the Court being fully advised in the matter now upon the records and files in said action and in particularly upon the Demurrer,

It is hereby ordered, adjudged and decreed that the Demurrer of the Defendants to the Complaint of the Plaintiffs be and the same is hereby in all things sustained.

Done at Huron, South Dakota, August 23, 1919.

By the Court:

(Signed) ALVA E. TAYLOR,
Judge.

Attest:
[SEAL.] H. J. HAMILTON,
Clerk.

Please take notice that the above and foregoing order sustaining the Demurrer of the Defendants to Plaintiff's Complaint was duly attested by the Clerk and filed in the office of the Clerk of the Courts in Kingsbury County, South Dakota, upon the 25th *1919* day of August, A. D. 1919.

(Signed) NULL & ROYHL,
Att'ys for Defendants.

To Hall & Purdy Att'ys for Plaintiffs Brookings, S. Dak.

Filed in the office of the Clerk of the Circuit Court in and for Kingsbury County, S. D. this 25 day of August, A. D. and recorded in Book No. 4 of Order Book page 206.

H. J. HAMILTON,
Clerk of the Circuit Court.

15 (Title in Circuit Court.)

Assignment of Errors.

The plaintiff in the above entitled action assign the following errors to the Order made by the said Circuit Court, therein dated August 23, 1919, sustaining demurrer interposed by the defendant to the complaint.

I.

That the Court erred in making the said Order dated August 23 1919 sustaining demurrer interposed by the defendant to the complaint.

II.

That the Court erred in sustaining the demurrer interposed by the defendants to the complaint, upon each and all and any of the grounds, specified in said demurrer.

Dated at Brookings, South Dakota, this 18th day of September 1919.

(Signed) HALL & PURDY,
Attorneys for Plaintiffs.

Brookings, South Dakota.

Filed in the office of the Clerk of the Circuit Court in and for Kingsbury County, S. D., this 19 day of Sept. A. D. 1919 and recorded in book No. —, page —.

H. J. HAMILTON,
Clerk of the Circuit Court.

16 STATE OF SOUTH DAKOTA, *ss:*

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of South Dakota, begun and held at Pierre, State of South Dakota, on the first Tuesday of April A. D. 1920 on the — day of the term, to-wit: On the 24th day of June, A. D. 1920.

Present, J. H. McCoy, Presiding Judge, Chas. S. Whiting, Ellison G. Smith, John Howard Gates, and Samuel C. Polley, Judges of said Court. The following proceedings were had and the following judgment was entered, to-wit:

STATE OF SOUTH DAKOTA, *ss:*

In the Supreme Court, April Term, A. D. 1920.

File No. 4630.

Present: J. H. McCoy, Presiding Judge, Chas. S. Whiting, Ellison G. Smith, John Howard Gates, and Samuel C. Polley, Judges of said Court, and the officers thereof.

J. H. HODGES et al., Plaintiffs and Appellants,

vs.

G. T. SNYDER et al., Defendants and Respondents.

This action coming on to be heard at the October A. D. 1919 Term of this Court at the Supreme Court Room, in the City of Pierre, State of South Dakota, upon the merits of the case and argued orally by counsel,—and the Court having advised thereon and filed its decision in writing.

It is considered, ordered and adjudged, that the orders of the Circuit Court, within and for Kingsbury County, appealed from herein, be and the same are hereby reversed.

17 & 18 And it is further ordered, That this action be and it is hereby remanded to said Circuit Court for further proceedings according tod law and the decision of this Court.

And it is further ordered and adjudged, That appellants have and recover of the respondents costs and disbursements on this appeal, expended, taxed and allowed at Sixty Dollars.

Whiting, J., dissenting in part.

By the Court,

J. H. McCOY,
Presiding Judge.

Attest:

[SEAL.] E. F. SWARTZ,
Clerk,
By S. G. DE LAND,
Deputy Clerk.

STATE OF SOUTH DAKOTA,
County of Hughes, ss:

I, E. F. Swartz, Clerk of the Supreme Court, within and for the State of South Dakota, do hereby certify that the above and foregoing is a full, true, correct and complete transcript and copy of the Judgment of the Supreme Court of the State of South Dakota, in the above entitled action, wherein J. H. Hodges, et al., are Plaintiffs and Appellants, versus G. T. Snyder, et al., Defendants and Respondents, as the same now remains of record in said Court.

In witness whereof, I have hereunto set my hand and affixed
seal of said Court, this 15th day of July, A. D. 1920.

[SEAL.] E. F. SWARTZ,
Clerk
By —— ——,
Deputy Clerk

19 This copy furnished without charge by courtesy of t
Judges of the Supreme Court.

STATE OF SOUTH DAKOTA:

Supreme Court.

#4630-R-P.

J. H. HODGES et al., Plaintiffs and Appellants,

vs.

G. T. SNYDER et al., Defendants and Respondents.

Appeal from the Circuit Court of Kingsbury County.

Honorable Alva E. Taylor, Judge.

Opinion.

Filed Jun. 24, 1920.

20 Hall & Purdy, of Brookings, S. D., Attorneys for App
lants.
Null & Royhl, of Huron, S. D., Attorneys for Defendants.

POLLEY, *J.*:

The defendants in this case are acting as the officers of the pu
ported Erwin Independent Consolidated District No. 1, of Kingsbur
County, and the Superintendent of Schools of that county. Plai
tiffs are resident property-owners and tax-payers of the territory em
braced within said purported school district. Prior to the acts com
plained of by plaintiffs, the said territory consisted of School Distric
Nos. 31, 32, 34, 35, and 50 of said county. During the months o
March and April, 1919, certain proceedings were had by defendants
to the end that, on the 16th day of April 1919, the Superintende
of Schools of said county made and signed an order in which he de
clared that School Districts Nos. 31, 32, 33, 34 and 50 be, and are
consolidated into a single district, to be known as Erwin Independen
Consolidated District No. 1 of Kingsbury County. Why District No
35 was omitted from the order does not appear. On the 8th day o
April 1919, an election was held in said purported Consolidated

School District, at which election a Board of Directors of such
21 district was elected. Thereatfer, and during the months of May and June, 1919, said Board took certain proceedings with a view of issuing bonds to the amount of $97,000 for the purpose of purchasing a school site and erecting a school building thereon, in the City of Erwin. Thereafter, on the 4th day of June 1919, an election was held in said purported district for the purpose of deciding whether said bonds should be issued. This election authorized the issuance of such bonds. Thereupon plaintiffs commenced this action and asked to have defendants enjoined and restrained from purchasing said school site or erecting the said school building, and from, in any manner, interfering with the schools as they existed in the said several school districts, or issuing or selling said bonds, or any part thereof; and that all the proceedings had for the establishment of such purported Consolidated School District and the issuing of said bonds he declared null and void.

At the commencement of the action, the court issued an order to show cause, on a certain day specified, why a temporary injunction should not be issued, and which order contained a meantime-restraining order. To plaintiffs' complaint, defendants interposed a general demurrer. The demurrer was sustained, and an order to that effect made and entered by the court. The court also, at the same time, made and entered a separate order vacating the meantime-restraining order and denying the pendente lite injunction. From this order
plaintiffs took an immediate appeal and also appealed from
22 the order sustaining defendants' demurrer. Both appeals are presented on the same brief.

It is contended by respondents that appellants, in the preparation of their brief, have not complied with Rule No. 4 of this Court, and that, for that reason, their brief should not be considered. In this contention respondents are clearly wrong. The portion of the rule that is claimed appellants have violated reads as follows:

"Each assignment, or group of assignments, if they present a like question, should be followed by the argument and authorities relied upon to sustain the alleged claim of error."

While appellants' assignments are stated in separate paragraphs and separately numbered, they all present like questions. True, the making of the order vacating the temporary restraining order is separately assigned as error, but the setting aside of that order followed as a matter of course when the demurrer to the complaint was sustained. The substance of both orders could more appropriately have been incorporated into one order, and then one assignment would have been sufficient and but one appeal would have been necessary. The assignments should be treated as a group of assignments presenting like questions.

Another question of practice is raised by respondents that must be disposed of before the merits of the case can be reached: Plaintiffs commenced the action in their own name as the real parties in interest, asking for equitable relief by injunction. Defendants contend

that this is not the proper remedy, but that plaintiffs should
23 have proceeded by an information in the nature of quo warranto. The reason, of course, as claimed by defendants, why plaintiffs should not be allowed to maintain this action is that, this being an action for equitable relief on the ground that the School District was not legally organized, it involves a collateral attack on the proceedings and the election to organize the district; and it is contended that such matter can be inquired into only in quo warranto proceedings. If this action involved merely an attack on the regularity of the proceedings and the election leading up to the organization of such school district, we might concede, though we do not decide, that quo warranto proceedings would be the only remedy. But this action goes further back than the proceedings to organize the district or the regularity of the said election: it questions the very right to organize a Consolidated or Independent district out of the territory involved, and a suit in equity in the name of the real parties in interest is the proper remedy.

The case of Brick Company v. Grand Forks, 145 N. W. 725, reported from North Dakota, cited and relied upon by appellants, is not analogous to this case. In that case there was no question as to the legal existence of the corporation involved, nor that the defendants were the legal officers thereof. The complaint in that case was that the corporation was trying to exercise its authority beyond
24 its territorial jurisdiction. Neither is the case of Nelson v. School District, 164 N. W. 874 (reported from Iowa), cited and relied upon by respondents, analogous to this case. That case was determined upon the theory that a de facto public corporation existed; but, in this case, it is claimed that there was not even a de facto corporation.

It is the contention of appellants that the purported Erwin Independent Consolidated School District No. 1 was not legally organized and never existed as a corporate entity, among other things for the reason that Chapter 194, Laws 1913 did not contemplate the inclusion of independent school districts in a consolidated district. This matter has been thoroughly considered by this court in Isaacson v. Parker — S. D. —, 176 N. W. 653 and again in the same case on rehearing, 177 N. W. — where the above contention of appellants was sustained. This is the construction adopted by the Code Commission, and, when they incorporated the law into the Code, they eliminated the words, "school districts of any kind," and inserted in lieu thereof the words, "two or more common school districts." §7569 Rev. Code 1919. But, immediately after the adoption of the Code and before it went into effect, the legislature amended this section by the enactment of Chapter 170 Laws 1919, which amendment provides that, "two or more school districts of any kind may consolidate" in any manner they see fit. This act, respondents contend, went into effect immediately upon its approval; that this was prior to any of the acts of consolidation complained of in this case; and, therefore, that consolidation was legal, under the provisions of this act, even though it might not have been authorized by the original

act of 1913. It is true, Chapter 170 Laws 1919 contains the following emergency clause:

"Whereas this act is necessary for the immediate support of the state government and its existing institutions, an emergency is hereby delared to exist and this act shall be in full force and effect from and after its passage and approval."

But it has already been declared to be the law of this state that the attachment of an emergency clause to a legislative act does not put it into immediate effect unless it comes within the exception named in Sec. 1, Art. 3 of the Constitution, State v. Whisman, 36 S. D. 260.

Prior to the amendment of Section 1, Article 3 of the Constitution, all legislative power of the state, subject to the veto of the Governor, was vested in the legislature. Under the provisions of Section 22 of Article 3, no act of the legislature could take effect until 90 days after the adjournment of the session at which such act was passed, except in case of an emergency to be declared by a two-thirds vote of all the members of each house, when and in that case such act took effect immediately upon its passage and approval, and such declaration by the legislature was conclusive upon that question. At the general election of 1898, §1 of Art. 3 was amended to read as follows:

"The legislative power of the state shall be vested in the legislature which shall consist of a senate and house of representatives, except that the people expressly reserve to themselves * * * the right to require that any laws which the legislature may have enacted shall be submitted to a vote of the electors of the state before going into effect, except such lawn as may be necessary for the immediate preservation of the public peace, health or safety, [and the] support of the state government and its existing public institutions * * *."

By the adoption of this amendment, the people reserved to themselves the right to pass upon the wisdom or expediency of any law enacted by the legislature, unless such law falls within one of the two classes excepted by the amendment, provided that any law will go into effect in accordance with the provisions of §5111 Code 1919, unless prior to that time a referendum petition, as provided by §5069 Revised Code, has been filed. The exception found in Sec. 1 of Art. 3, names two classes of laws that are not subject to the referendum: First, such laws as are declared by the act itself to be necessary for the immediate preservation of the public peace, health or safety of the state; and Second, such laws as are necessary for the support of the Government and its existing public institutions. A law may be necessary for the preservation of the public peace, health, or safety and still be subject to the referendum unless the legislative declares it necessary for the immediate preservation of the public peace, health or safety; in which case it will go into effect in accordance with the provision of §5111 Rev. Code 1919, but in the meantime it will not be subject to the

referendum. If the legislature declares such a law necessary for the immediate preservation of the public peace, health or safety, and attaches to such law an emergency clause as provided for in §22, Art. III, of the constitution, then such law will go into effect immediately or at such time thereafter as the legislature may fix and in the meantime it will not be subject to the referendum. But a law that is necessary for the support of the state government or its existing public institutions is not subject to the referendum in any event and will go into effect in accordance with the provisions of §5111 Rev. Code 1919, unless the legislature declares the existence of an emergency, under §22, Art. 3, Const. in which case such law will go into effect immediately or at such time as the legislature may fix. The operation of such laws cannot be suspended nor postponed by the filing of a referendum petition. State vs. Clausen 85 Wash. 260.

Whether a law is in its substance and effect, a law for the preservation of the public peace, health or safety, or for the support of the state government and its existing public institutions, is a question for the courts to decide, subject to the rule that in case of
27 doubt the legislative will should be given effect.

Whether an emergency exists which makes it necessary that a law belonging to either one of these two classes should go into immediate effect is a question for the legislature, to be conclusively evidenced by a declaration of emergency under the provisions of §22, Art. 3, of the Constitution.

Whether the necessity is immediate, where a law is for the preservation of the public peace, health or safety, even though the emergency clause be not attached, is a question for the legislature, to be conclusively evidenced by a declaration in appropriate language.

In State vs. Bacon 14 S. D. 394, 85 N. W. 605 this court held that the declaration of an emergency by the legislature was conclusive as to any law without regard to the referendum clause in §1. This was on the theory that §22 was still in force, that the legislature could put any law into immediate effect by attaching an emergency clause thereto, and that a law could not be referred after it had gone into effect. But this case was overruled in State vs. Whisman Supra, where it was held that the attachment of an emergency clause would not put a law into immediate effect, unless such law came within one of the clauses that are excepted from the referendum clause. The effect of the referendum clause therefore was to amend or modify §22 of Art. 3, by implication so that it is only such laws as are not subject to the referendum clause that can be put into immediate effect by the declaration of an emergency.

It is not contended by respondents, and could not be seriously contended, that the support of the state government and its existing public institutions depended upon Ch. 170, Laws of 1919, going into effect immediately upon its passage and approval. If merely attaching the emergency clause would put any law into immediate operation and prevent a vote thereon under the referendum clause, then the legislature could attach the emergency clause to any law that could secure a two-thirds vote of the legislature, and, in
28 that way, practically nullify the referendum clause in the Constitution. For the legislature to say that the "support of

the state government and its existing institutions" depended upon the immediate operation of Chapter 170, Laws 1919 was a mere absurdity. Chapter 170, Laws 1919 did not go into effect until the first day of July, 1919.

We hold that the attempt to organize the Erwin Consolidated School District was not authorized by any law then in force, and that the attempted organization was wholly futile.

The orders appealed from are reversed.

WHITING, *J.*, dissenting:

I concur fully in what is said in the foregoing opinion in relation to the construction given §§ 1 and 22 Art. 3 of our Constitution; but I dissent from the result reached by my colleagues. The grounds for my dissent will be found stated in my dissenting opinion upon the rehearing in Isaacson v. Parker, 177 N. W. —.

Filed in the office of the Clerk of the Circuit Court in and for Kingsbury County, S. D. this 16th day of July A. D. 1920 and recorded in Book No. — of —, page —.

H. J. HAMILTON,
Clerk of the Circuit Court.

29 STATE OF SOUTH DAKOTA, *ss:*

In Supreme Court.

J. H. HODGES et al., Plaintiffs and Appellants,

vs.

G. T. SNYDER et al., Defendants and Respondents.

I, E. F. Swartz, Clerk of the Supreme Court in and for the State of South Dakota, do hereby certify that the foregoing pages numbered from 1 to 10 inclusive, contain a true and correct copy of the opinion of the Court in the above entitled cause, and of the whole thereof, as the same now remains of record in said Supreme Court.

In witness whereof I have hereunto set my hand and affixed the Seal of said Court, at Pierre, this 15th day of July, A. D. 1920.

(Signed)
[SEAL.]

E. F. SWARTZ,
Clerk of the Supreme Court,
By —— ——,
Deputy.

Filed in the office of the Clerk of the Circuit Court in and for Kingsbury County, S. D., this 16th day of July, A. D. 1920, and recorded in Book No. — of —, page —.

H. J. HAMILTON,
Clerk of the Circuit Court.

30 (Title in Circuit Court.)

Order to Show Cause.

Upon reading and filing the affidavit of Philo Hall, one of the attorneys for the plaintiffs in the above entitled action which affidavit is hereto annexed; and the court being fully advised in the premises it is hereby ordered that the above defendants show cause before this court at Huron in said Ninth Judicial Circuit of the state of South Dakota, August 16, 1920 at 2 o'clock P. M. of that day or as soon thereafter as the court can conveniently hear the same, why judgment should not be rendered therein awarding the plaintiffs the relief prayed for in their complaint herein, including a permanent injunction against the said acts of the defendants complained of and the continuance in force of the restraining provisions contained in the original show cause order issued herein, and for costs and disbursements.

That this order to show cause together with the said affidavit of Philo Hall be served upon the attorneys for the defendants Messrs. Null & Royhl on or before the 9th day of August, 1920, that they may have until the 13th day of August, 1920, within which to serve any affidavit in opposition thereto, and that the plaintiffs may have until 16th day of August, 1920 within which to serve rebuttal affidavit, should they so desire.

Dated at Huron, South Dakota, this 4th day of August, 1920.

By the Court:

Attest:

(Signed) ALVA E. TAYLOR,
Judge.

[SEAL.] H. J. HAMILTON,
Clerk.

Due and personal service of the within affidavit and Order to copy thereof is hereby admitted at Huron, South Dakota, this 6th day of August, 1920.

NULL & ROYHL,
Attorneys for Defendants.

Filed in the office of the Clerk of the Circuit Court in and for Kingsbury County, S. D., this 23rd day of Sept. A. D. 1920, and recorded in Book No. 4 of Order Book page 265.

H. J. HAMILTON,
Clerk of the Circuit Court.

31 (Title in Circuit Court.)

Affidavit.

STATE OF SOUTH DAKOTA,
County of Brookings, ss:

Philo Hall, being duly sworn deposes and says that he is one of the attorneys for the plaintiffs in the above entitled action, that on the 23rd day of August, 1919, the said Circuit Court after argument by the respective parties made an order sustaining the demurrer interposed by the defendants to complaint in the above entitled action, and also on the same day made an order denying the relief by injunction sought by the plaintiff- therein, by order to show cause, and dissolving and setting aside the restraining order contained therein; that plaintiffs took an appeal from both of said orders to the Supreme Court, of this state and by decision and opinion dated June 24th, 1920, said Supreme Court reversed both of said orders; that the remittitur was sent out by Clerk of said Supreme Court to and filed with the clerk of said Circuit Court within and for the County of Kingsbury, July 15th, 1920 and that no answer or other pleadings have been served or filed by the defendants or any of them therein; that more than fifteen days have elapsed since the filing of said remittitur.

Wherefore affidavit prays the Court to issue an order to show cause, requiring the defendants to show cause why judgment should not be entered in said Circuit Court, in conformity with said opinion and decision of the Supreme Court granting to the plaintiffs a permanent injunction and other relief as prayed for in the complaint herein, and making the restraining provisions contained in said
32 original restraining order permanent, and for costs and disbursements.

(Signed) PHILO HALL.

Subscribed and sworn to before me this 3 day of August, A. D. 1920.

[SEAL.] WALLACE E. PURDY,
Notary Public, South Dakota.

Filed in the office of the Clerk of the Circuit Court in and for Kingsbury County, S. D., this 23rd day of Sept. A. D. 1920 and recorded in Book No. — of —, page —.

H. J. HAMILTON,
Clerk of the Circuit Court.

33 (Title in Circuit Court.)

Judgment.

The above entitled action coming on regularly for hearing upo the application of the above named plaintiffs for judgment in the favor as prayed for in the complaint herein, and for making th restraining order contained in the original show cause order perma nent, and for costs and disbursements, and

It appearing satisfactorily to the court that the order to show cau issued herein on the 4th day of August, 1920, has been duly serv upon the attorneys for the defendants; that by a decision and opini dated June 24th, 1920 the Supreme Court of the State of So Dakota reversed the orders made by this court August 23rd, 19 sustaining the demurrer interposed by the defendants to the co plaint herein and denying the plaintiff- the relief by the injunct sought by the order to show cause issued therein, and

It appearing by said decision of the Supreme Court, that the p ceedings had by the defendants and others for the consolidation the school district mentioned in the complaint and the creation a consolidated school district named and known as the Erwin In pendent Consolidated School District No. 1 of Kingsbury Coun State of South Dakota, were null and void and that no such co solidated school district exists; and that the plaintiffs are entit to the relief prayed for in their complaint herein, and that the s restraining order should be continued and made permanent; th the remittitur herein was filed with the clerk of the Circuit Co on or about July 15th, 1920, that more than fifteen days since t filing of said remittitur have elapsed and no answer or any oth pleadings have been served by the defendants;

34 Now therefore on the motion of Hall & Purdy, attorne for plaintiff-, it is hereby ordered, adjudged and decreed th the above named defendants and each of them, and all persons a ing by, through or under them or either of them in any manner a hereby permanently enjoined from proceeding further as a co solidated school district, and from in any manner assuming or und taking to assume that the said purported Erwin Independent Co solidated School District No. 1 of Kingsbury County, South Dak is in fact or law a consolidated school district and from in any ma ner interferring with the conduct of said school districts Nos. 3 32, 34, 35 and 50 and the maintenance of schools therein, and fr purchasing any site or erecting any school building for said p ported, consolidated school district and from issuing bonds in t sum of Ninety seven thousand dollars ($97,000.00) or any bo whatsoever, purporting to be the obligations of said alleged Er Independent Consolidated School District No. 1 of Kingsbury Coun South Dakota, and from advertising for bids therefor and fr selling the same, and from conducting or attempting to conduct s alleged consolidated school district, and from acting or purporting act as officers thereof.

It is further ordered, adjudged and decreed that the proceedings had for the said consolidation of school districts and the attempted creation of said Erwin Independent Consolidated School District No. 1 of Kingsbury County, State of South Dakota, are null and void and that no such consolidated school district exists in fact or law and that the restraining provisions contained in the order to
35 show cause issued by the court herein dated June 10th, 1919 are hereby continued in effect and made permanent.

It is further ordered and adjudged that the plaintiffs have and recover from the defendants and each of them their costs and disbursements herein to be hereafter taxed by the clerk of said court and inserted herein at the sum of $71.60 *Dollars.*

Done at Huron, in said Ninth Judicial Circuit of the State of South Dakota, this 18th day of Sept. 1920.

By the Court:

(Signed) ALVA E. TAYLOR,
Judge.

Attest:

[SEAL.] H. J. HAMILTON,
Clerk.

Filed in the office of the Clerk of the Circuit Court in and for Kingsbury County, S. D. this 23rd day of Sept. 1920 and recorded in Book No. 6 of Judgments, page 337.

H. J. HAMILTON,
Clerk of the Circuit Court.

36 STATE OF SOUTH DAKOTA,
County of Kingsbury, ss:

In Circuit Court, Ninth Judicial Circuit.

J. H. HODGES, NICK HOFFMAN, WALTER ANDERSON, E. E. ACKLEY, and H. M. Muser, on Behalf of Themselves and of All Other Electors and Taxpayers Similarly Situated, Plaintiffs,

vs.

G. T. SNYDER, C. W. WALKOW, A. O. WALKOW, C. J. NOYES, and J. W. Earl, as Members of the Board of Education of the Purported Consolidated School District Named and Known as Erwin Independent Consolidated School District #1 of Kingsbury County, State of South Dakota, and C. A. Jepson, Clerk, and J. W. Kruger, Treasurer, of said Pretended Consolidated School District, and M. L. McCarty, County Superintendent of Schools of Kingsbury County, South Dakota, Defendants.

Affidavit.

STATE OF SOUTH DAKOTA,
County of Kingsbury, ss:

M. L. McCarty, being first duly sworn, on oath says: That she is the County Superintendent of Schools of Kingsbury County, South

Dakota, and one of the defendants in the above entitled action, and makes this affidavit on behalf of all the defendants above named.

That heretofore, and during the months of March and April, 1919 certain proceedings were had under Chapter 5, Sections 7569 to 7577 inclusive, of the Revised Code of 1919, as amended by Chapter 176 of the Session Laws of 1919, for the organization of a consolidated School District to be comprised of School Districts Nos. 31, 32, 33, 34 and 50, in Kingsbury County, South Dakota; that pursuant to such proceedings, and on or about the 16th day of April, 1919, an Order was made by the County Superintendent of Schools in and for Kingsbury County, as follows:

"Whereas an election was held on the 8th day of April 1919 by the electors of School districts Nos. 31, 32, 33, 34, and 50 in the County of Kingsbury and State of South Dakota, for the purpose of voting upon the question of the consolidation of the said districts, as provided by Chapter 194, of the Session Laws of 1913, and laws amendatory thereto, and in accordance with a plan approved by the State Superintendent of Public Instruction, and it appears
37 from the certified returns of said election that there were 273 votes cast at said election upon said question, of which three-fifths or more were for consolidation, to-wit: 193 votes for consolidation and 80 votes against consolidation, it is hereby ordered that the said districts 31, 32, 33, 34 and 50 as designated in the plan approved for this consolidation be consolidated as provided by said Chapter 194 of the Session laws of 1913, and laws amendatory thereto, and that the title of said consolidated district shall be Erwin Independent Consolidated District Number One of Kingsbury County, South Dakota. Given under my hand and the seal of the County Superintendent of Schools of Kingsbury County, South Dakota this 16th day of April 1919."

That thereafter, and in due course of procedure, the defendants other than affiant, were elected officers of said Erwin Consolidated School District, and are now the duly elected and qualified officers of such district;

That thereafter the above entitled action was instituted to secure an injunction enjoining the said defendants, as follows:

"Wherefore plaintiffs pray the Court to enjoin the said defendants and all persons acting by, through or under them in any manner, both temporarily and permanently from proceedings further as a consolidated school district and from, in any manner, assuming or undertaking to assume that said alleged Erwin Independent Consolidated School District No. 1 of Kingsbury County, South Dakota, is in fact or in law a consolidated school district and from, in any manner, interfering with the conduct of the said school districts #31, #32, #34, #35 and #50 and the maintenance of schools therein and from purchasing any site or erecting any school building for said purported consolidated school district and from issuing said Bonds for the sum of $97,000.00 or any bonds whatsoever purporting to be the obligations of said alleged Erwin Independent Consolidated

School District #1 of Kingsbury County, South Dakota and from advertising for bids therefore and from selling the same and for such other and further relief in the premises as to the Court may seem just and equitable and for costs and disbursements of this action including reasonable amount of counsel fees.

Dated at Brookings, South Dakota this 7th day of June, 1919."

That said defendants appeared and interposed a demurrer to the complaint in this action, which upon hearing, had in this Court, was sustained. Thereafter the plaintiffs appealed from said ruling on said demurrer to the Supreme Court of the State of South Dakota;

That on such appeal such proceedings were had that on June 24th, 1920, a decision was filed reversing the said Order appealed from. That in the said decision it was held and decided that the emergency clause portion of the Act of February 27th, 1919 being an act amending Sec. 7569 of the Revised Code of 1919, was void, and that by reason thereof the attempt to organize the Erwin Consolidated School District, was not authorized by any law then in force and the attempted organization was wholly futile.

38 That thereafter such proceedings were had as that on the — day of September, 1920, a Decree was entered in this Court granting the plaintiffs an injunction as follows:

"Now therefore on the motion of Hall & Purdy, attorneys for plaintiff, it is hereby ordered, adjudged and decreed that the above named defendants and each of them, and all persons acting by, through or under them or either of them in any manner are hereby permanently enjoined from proceedings further as a consolidated school district, and from in any manner assuming or undertaking to assume that the said purported Erwin Independent Consolidated School District No. 1 of Kingsbury County, South Dakota is in fact or law a consolidated school district and from any manner interfering with the conduct of said school district- No-. 31, 32, 34, 35 and 50 and the maintenance of schools therein, and from purchasing any site or erecting any school building for said purported, consolidated school districts and from issuing bonds in the sum of Ninety seven thousand dollars ($97,000.00) or any bonds whatsoever, purporting to be the obligations of said alleged Erwin Independent Consolidated School District No. 1 of Kingsbury County, South Dakota, and from advertising for bids therefor and from selling the same, and from conducting or attempting to conduct said alleged consolidated school district, and from acting or purporting to act as officers thereof.

It is further ordered, adjudged and decreed that the proceedings had for the said consolidation of school districts and the attempted creation of said Erwin Independent Consolidated School District No. 1, of Kingsbury County, State of South Dakota, are null and void and that no such consolidated school district exists in fact or law and that the restraining provisions contained in the order to show cause issued by the Court herein dated June 10th, 1919 are hereby continued in effect and made permanent.

It is further ordered and adjudged that the plaintiffs have and recover from the defendants and each of them their costs and disbursements herein to be hereafter taxed by the clerk of said court and inserted herein at the sum of — dollars."

That after the said decision by the Supreme Court, and on the 26th day of June, 1920, an Act was passed and approved, known as Chapter 47 of the Laws passed at the special session of the Legislature begun and held at the Capitol on June 21st, 1920, in which it is provided among other things:

"Section 2. That all acts and proceedings relating and pertaining to the organization and incorporation of any consolidated School District organized or attempted to be made, organized and incorporated under the provisions of Chapter 5 of the Revised Code of 1919, formerly Chapter 194, Laws of 1913, and acts amendatory thereof are hereby legalized and validated, as of the date when said Consolidated School Districts were organized and incorporated under said laws, notwithstanding any irregularity or errors, omissions or defects, clerical in law or otherwise, in the organization and incorporation thereof, or any defect, ambiguity or omission, want
39 or lack of power in the Statute authorizing such organization and incorporation; and in all cases where a former Independent School District and any part or all of any one or more other School District or Districts have proceeded to organize as a Consolidated District, all proceedings relating or pertaining thereto, are hereby legalized and validated as of the date of any such organization or incorporation, notwithstanding any errors, omissions or defects in the organization or incorporation thereof, or any defect, ambiguity or omission, want or lack of power in the Statute authorizing such organization and incorporation; and all of said Consolidated School Districts are hereby declared to have existed as Independent Consolidated School Districts under the laws of the State of South Dakota since said organization and incorporation, and composed of the territory described and defined in the proceedings for consolidation and incorporation, and all acts of the officers of said State or County or School Districts and all proceedings for bonding and taxation and for school purposes had therein relating to Independent Consolidated School Districts, are hereby ratified, legalized and validated, notwithstanding any errors, omissions or defects, ambiguities, clerical or otherwise, or want or lack of power in the Statutes, in the organization and incorporation of said Districts.

That said Act went into force and effect on September 26th, 1920. That the terms of said Act are such as that the proceedings to organize Erwin Consolidated School District was, notwithstanding want or lack of power in the Statute, legalized and validated, and all proceedings pertaining thereto were legalized and validated and that by virtue of said Act said Erwin Consolidated School District was declared to have existed as an Independent Consolidated School District, and composed of the territory described and defined in the said proceedings for consolidation and incorporation;

That said Curative Act is directly applicable to and does apply in all things to said Erwin Consolidated School District, and by virtue thereof the injunction heretofore granted has become obnoxious to said Statute and wrongfully deprives the defendants as officers of said Erwin Consolidated School District from discharging and affiant as County Superintendent from discharging their duties as such officers.

Wherefore, Defendants pray that said Decree of injunction be vacated and set aside.

MRS. M. L. McCARTY,
County Superintendent of Schools of Kingsbury County, State of South Dakota.

Subscribed and sworn to before me this 16th day of October, A. D., 1920.

H. J. HAMILTON,
Clerk of the Circuit Court, Kingsbury County, S. D.

40 (Title in Circuit Court.)

Order to Show Cause.

Upon the application of Null & Royhl, Attorneys for the above defendants, and upon the Affidavit of M. L. McCarty, one of the defendants for and on behalf of all the defendants, and upon all the records, files and pleadings in this case, and the Court being fully advised herein,

It is hereby ordered: That the above named plaintiffs, J. H. Hodges, Nick Hoffman, Walter Anderson, E. E. Ackley, and H. M. Muser, on behalf of themselves and of all other electors and taxpayers similarly situated, show cause before this Court at the Court House in the City of Huron, Beadle County, South Dakota, on the 1st day of November, 1920, at ten o'clock A. M., or as soon thereafter as counsel can be heard, why this Court should not make an Order vacating, setting aside and nullifying the Decree of Injunction entered and made by this Court in the above action, said Decree of Injunction being dated September 18th, 1920, and filed in the Clerk of Court's office, Kingsbury County, South Dakota, on the 23rd day of September, 1920, and recorded therein in Book — Page —.

It is further ordered That this Order and Affidavit of M. L. McCarty (in part upon which this Order is based) be served upon the plaintiffs at least six days before the day set for hearing, and that all answering Affidavits and papers shall be served upon the Defendants' Attorneys at least five (3) days before the day set for hearing, and that all rebuttal affidavits and papers shall be served upon plaintiffs' attorneys at the hearing.

Dated at Huron, South Dakota, this 25th day of October, A. D. 1920.

By the Court:

(Signed) ALVA E. TAYLOR,
Judge.

Attest:

[SEAL.] H. J. HAMILTON,
Clerk.

Filed in the office of the Clerk of the Circuit Court in and for Kingsbury County, S. D., this 24th day of Dec. A. D. 1920 and recorded in Book No. 4 of Order Book page 280.

H. J. HAMILTON,
Clerk of the Circuit Court.

41 (Title in Circuit Court.)

Objections to Granting of Order to Set Aside Decree of Injunction.

Come now the above named plaintiffs and object to the court setting aside, or nullifying the Decree of Injunction rendered herein September 18th, 1920, and duly filed and entered of record in the office of the Clerk of the above named Court September 23rd, 1920, for the following reasons:

I.

That the purported curative Act, Chapter 47 of the Laws of the Special Session of 1920, did not become operative until September 26th, 1920, and after the entry of said judgment and decree pursuant of the decision of the Supreme Court rendered herein, dated June 24th, 1920, and the Legislature was without power or authority to nullify or impair such decree or deprive these plaintiffs of their vested rights and interest thereunder.

II.

That said Special Act is repugnant to and in violation of the provisions of the Federal Constitution and the Constitution of the State of South Dakota, in that it seeks to deprive persons and taxpayers of property without due process of law and to impair the obligation of contracts and takes private property for public use without compensation.

III.

That said Special Act is unconstitutional and void in that it purports to validate acts of persons, regardless of regularity of proceedings or notice to tax payers, a majority vote or opportunity to be heard in the organization of consolidated school districts and issuance of bonds.

42

IV.

That such Act is unconstitutional and void in that it purports to validate such proceedings and bonds although no legal authority whatever existed for such proceedings or issuance of such bonds and that the Legislature was and is without power or authority to thus create corporations or authorize issuance of bonds regardless of notice to or opportunity to be heard by taxpayers affected thereby and not having authority so to do originally, it cannot ratify such unlawful acts.

V.

That the Court is without jurisdiction to vacate such judgment and decree lawfully entered in the absence of fraud or mistake nor any of the recognized grounds for vacating judgments, and that it cannot be thus attacked by defendants, but if aggrieved thereby they had the right to appeal therefrom to the Supreme Court. That the decision of the Supreme Court herein is res judicata of the questions herein involved.

VI.

That the Legislature is without power to validate acts by means of a Curative Statute, or otherwise, which it had not the power to enact originally, and that it did not have power originally to arbitrarily incorporate a consolidated school district, absolish and take away the property of existing school districts and issue bonds affecting taxpayers, without notice to such taxpayers or giving them an opportunity to be heard.

VII.

That the Legislative Department of Government cannot trench upon or usurp the functions and powers of the judicial department by declaring acts to be valid which have been finally determined to be void by the Supreme Court. This would constitute
43 a legislative reversal of a judicial decision, contrary to our Federal and State Constitutions and be repugnant to our theory and the fundamental principles of Government.

Dated this 30th day of October A. D. 1920.

HALL & PURDY,
Attorneys for Plaintiff.

Brookings, S. D.

Filed in the office of the Clerk of the Circuit Court in and for [illegible]ary County, S. D., this 24th day of Dec. A. D. 1920 and re[illegible]ed in Book No. —, page —.

H. J. HAMILTON,
Clerk of the Circuit Court.

44 (Title in Circuit Court.)

Order.

The above entitled action coming on for hearing before said Co at the Court House in the City of Huron, in the County of Bea and State of South Dakota, on the 1st day of November, 1920, up the order to show cause issued by the Court herein, dated Octo 25, 1920, which order required the plaintiffs to show cause why t court should not make an order vacating, setting aside and nullif ing the decree of injunction entered and made by this Court in t above action, dated September 18th, 1920 and filed in the office the Clerk of Courts, of Kingsbury County, South Dakota, on t 23rd day of September, 1920; the defendants appearing by Mes Null & Royhl, their attorneys, in support of said motion, and t plaintiffs appearing by Hall & Purdy, their attorneys, in opposit thereto. The order to show cause and motion of the defendants b ing supported by the affidavit of M. L. McCarty served with s order to show cause and the plaintiffs having duly filed and p sented to the court their written objections to the granting of s order to show cause, and the relief sought by the defendants the under, which objections in writing are filed with the original pap herein. The said affidavit of M. L. McCarty, on behalf of the d fendants and the said written objections on the part of the plaintif being the only evidence and documents used upon said hearing, a after having heard the arguments of counsel, and the court bei fully advised in the premises:

45 It is hereby ordered that the relief sought by the defe ants in and by said order to show cause, to-wit: why this co should not make an order vacating, setting aside and nullifying t decree of injunction entered and made by this court in the abo entitled action, dated September 18th, 1920, be and the same wholly denied.

Dated at Huron, in said Ninth Judicial Circuit in the State South Dakota, this 27th day of December, 1920.

By the Court:
(Signed) ALVA E. TAYLOR,
Judge.

Attest:
[SEAL.] H. J. HAMILTON,
Clerk.

Dec. 27th, 1920

To the making and entering of the foregoing order the defend excepts and the exception is allowed.
By the Court:
(Signed) ALVA E. TAYLOR,
Judge.

Due and personal service of the within order by copy thereof is hereby admitted at Huron, South Dakota, this 12th day of January, 1921.

NULL & ROYHL,
Attorneys for Defts.

Filed in the office of the Clerk of the Circuit Court in and for Kingsbury County, S. D. this 4th day of Jany. A. D. 1921 and recorded in Book No. 4 of Orders page- 281-2.

H. J. HAMILTON,
Clerk of the Circuit Court.

46 STATE OF SOUTH DAKOTA, *ss:*

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of South Dakota, begun and held at Pierre, State of South Dakota, on the first Tuesday of October, A. D. 1921, on the — day of the term, to-wit: On the 31st day of January A. D. 1922.

Present: John Howard Gates, Presiding Judge; Chas. S. Whiting, Ellison G. Smith, Frank Anderson, and Samuel C. Polley, Judges of said Court. The following proceedings were had and the following judgment was entered, to-wit:

STATE OF SOUTH DAKOTA, *ss:*

In the Supreme Court, October Term, A. D. 1921.

File No. 4849.

Present: John Howard Gates, Presiding Judge; Chas. S. Whiting, Ellison G. Smith, Frank Anderson and Samuel C. Polley, Judges of said Court, and the officers thereof.

J. H. HODGES et al., Plaintiffs and Respondents,

vs.

G. T. SNYDER et al., Defendants and Appellants.

This action coming on to be heard at the October A. D. 1920 Term of this Court at the Supreme Court room, in the City of Pierre, State of South Dakota, upon the merits of the case and argued orally by counsel, and the Court having advised thereon and filed its decision in writing.

47 It is considered, ordered and adjudged, that the order of the Circuit Court, within and for Kingsbury County, appealed from herein, be and the same is hereby reversed, and the Circuit Court is directed to vacate the injunctional orders contained in its final judgment.

And it is further ordered, That this action be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

And it is further ordered and adjudged, That appellants have and recover of the respondents costs and disbursements on this appeal expended, taxed and allowed at Seventy-nine and no/100 Dollars.

By the Court:

(Signed) JOHN HOWARD GATES,
Presiding Judge.

Attest:
[SEAL.] E. F. SWARTZ,
Clerk.

STATE OF SOUTH DAKOTA,
County of Hughes, ss:

I, E. F. Swartz, Clerk of the Supreme Court, within and for the State of South Dakota, do hereby certify that the above and foregoing is a full, true, correct and complete transcript and copy of the Judgment of the Supreme Court of the State of South Dakota, in the above entitled action wherein, J. H. Hodges, et al., are Plaintiffs and Respondents, versus G. T. Snyder, et al., Defendants and Appellants, as the same now remains of record in said Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this 21st day of February A. D. 1922.

[SEAL.] E. F. SWARTZ,
Clerk,
By S. G. DE LAND,
Deputy Clerk.

48 Costs and disbursements taxed and allowed as follows:

Before Argument	$5.00
For Argument	15.00
Clerk's Fees to Perfect Appeal Record	3.00
Printing Brief	46.00
Fees Clerk of Supreme Court	10.00
Total	79.00

Filed in the office of the Clerk of the Circuit Court in and for Kingsbury County, S. D. this 24th day of Feby. A. D. 1922 and recorded in Book No. 6 of Judgments page 392.

H. J. HAMILTON,
Clerk of the Circuit Court.

49 This copy furnished without charge by courtesy of the Judges of the Supreme Court.

In the Supreme Court of the State of South Dakota.

#4849—r—"W."

J. H. HODGES and Others, Plaintiffs and Respondents,

vs.

G. T. SNYDER and Others, Defendants and Appellants.

Appeal from the Circuit Court of Kingsbury County.

Hon. Alva E. Taylor, Judge.

Opinion.

Filed Jan. 31, 1922.

50 #4849.

Xull & Royhl, Huron, Attorneys for Appellants.
Hall & Purdy, Attorneys for Respondents.

WHITING, *J.*:

This cause has been before us upon a former appeal, our decision being reported in 43 S. D. 166, 178 N. W. 575. It was then held that the attempted organization of the purported school corporation, of which defendants claim to be officers, was invalid because there was then no statute authorizing the incorporating of an independent district into a consolidated school district. Such decision was filed and announced June 24, 1920, and remittitur filed below July 15, 1920. On June 26, 1920, the legislature enacted c. 47 Laws Special Session 1920. This law, under §22 Art. 3 of the Constitution and §5111 R. C. 1919, went into effect on the ninety-first day after its enactment, or September 25, 1920. On September 18, 1920, the trial court entered its judgment, based upon the judgment of this court, and held the attempted incorporation of defendant district invalid, and permanently enjoined the defendants "from proceeding further as a consolidated school district, and from in any manner assuming or undertaking to assume that said purported Erwin Independent Consolidated School District * * * is in fact or law a consolidated school district, * * * and from purchasing any site or erecting any school building for said purported consolidated school district, and from issuing bonds * * * purporting to be the obligations of said alleged Erwin Independent Consolidated School District * * *, and from advertising for bids therefor, and from selling the same, and from conducting or attempting to conduct said alleged consolidated school district, and from acting or purporting to act as officers thereof." After
51 the said c. 47, supra, went into effect, the defendants, basing their motion on the proposition that such statute cured the

defective organization of the alleged consolidated district, move the circuit court to vacate the features of the decree above set out. The trial court entered an order denying the motion; and from such order this appeal was taken.

But two questions are presented: (*a*) Did the Curative Act apply to this particular school district, the final judgment of the trial court adjudging the organization thereof invalid, having been rendered before such Curative Act went into effect? (*b*) If the answer to the above question be in the affirmative, should appellants have sought the vacation of the injunction, or should they have proceeded in disregard of the injunctional decree after the Curative Act went into effect?

In contending for a negative answer to the first question, respondents base their whole case upon the fact that, prior to the going into effect of the Curative Act, there had been a final adjudication holding that the attempted organization of this alleged consolidated district was invalid. They quote from Cooley's Const. Lim. (5th Ed.) 113:

"The legislative action cannot be made to retroact upon past controversies and to reverse decisions which the courts in the exercise of their undoubted authority have made, for this would not only be the exercise of a judicial power, but it would be its exercise in the most objectionable and offensive form, * * *";

and from 6 R. C. L. 162:—

"Since the legislature does not possess and cannot assume the exercise of judicial powers, it cannot interfere in any way with pending judicial controversies. Therefore the legislature cannot annul or set aside the final judgment of a court of competent jurisdiction."

No one would question the soundness of the propositions cited, but they have no application to the facts of this case.

52 No claim is made by respondents but that this Curative Act was a valid legislative enactment and, as such, applicable to, and effective for the purpose of, curing any defect in the organization of other territory which included an independent district and had attempted to organize into a consolidated school district,—provided there had not been, as to such territory, as there had been as to this one, a judicial determination of the invalidity of such attempted organization. The enactment of this Curative Act was a proper exercise of a purely legislative function; such Act in no manner whatsoever reversed, or interfered with the judgment of any court; what it did do was to change the legal status of every territory constituted like the territory involved in this action, and which like this territory, had attempted but had failed to organize into a consolidated district. We must bear in mind at all times that the judgment of a court, in an action wherein the court is called upon to determine the legal status of a person or thing, does not change such status, but merely declares what it has been and is. The status of the particular territory involved in this action was

after the final judgment rendered in this action, identical with its status before—it was also, after such judgment, exactly the same as the status of every territory having within its border an independent district which had attempted to organize as a consolidated district under the law existing prior to the Curative Act, the only difference being that, as to the one attempted consolidation before the court, there was entered a decree addressed to those purporting to be officers thereof and forbidding their acting as such officers, though acts of theirs would not, because of such decree, have been a whit more illegal than would have been like actions of the officers of any like territory as to which there had been no adjudication.

53 Respondents cite authorities in support of the legal propositions above quoted. These authorities, with one or two exceptions, fully support such propositions. In these cases, the legislative branches of government had attempted to control or overturn the actions of courts in matters peculiarly within judicial, as distinguished from legislative, control. In Dorsey v. Dorsey, 11 Am. Rep. 528, there was involved an Act authorizing courts to reopen cases theretofore decided; this Act was held unconstitutional as an attempt to exercise judicial power. In Denny v. Mattoon, 79 Am. Dec. 784, it was held that the Legislature was without power to validate insolvency proceedings that had been prosecuted before a person having no title to the office of judge of insolvency. In McCartney v. Shipperd, 177 Pac. 814, an Act attempting to validate all appeals taken within a certain period after judgment or order, was held invalid as to appeals taken before the law was enacted. In Ratcliffe v. Anderson, 31 Am. Rep. 716, an Act authorizing the opening of judgments theretofore rendered was held invalid. In People v. Supervisors, 26 Mich. 21, a decision by Justice Cooley, it was held that the Act in question was not a Curative Act at all, but an attempt indirectly to override judgments theretofore rendered. In State v. Flint, 63 N. W. 113, it was held that a legislature cannot, by an Act subsequent to judgment, grant a new trial or trial de novo. Ean v. Chi. Ry. Co., 76 N. W. 328, and Kearney Co. v. Taylor, 74 N. W. 965, are absolutely foreign to the propositions under which cited, or to any question in the present case. In De Chastellux v. Fairchild, 53 Am. Dec. 570, it was held that the legislature has no power to order a new trial, or to direct the court to order it, either before or after judgment, such power being judicial. In Connell v. Vaughn, 40 Ga. 154, it
54 was held that an Act authorizing actions to reduce money judgments theretofore obtained was unconstitutional. In Bd. of Com. v. Workman, 103 N. E. 99, a judgment had been entered under which vested rights were acquired; it was held that by later legislation these vested rights "could not be impaired." In Thomas v. City of Portland, 66 Pac. 439, the court announced propositions analagous to those quoted by respondents from Cooley and C. J., supra, but held them inapplicable to facts of that case. It seems too clear for dispute that these decisions have not the slightest bearing upon the question before us.

The legislature is the law-making body and, while acting within its proper sphere, is no more subject to restriction by the judiciary than the judiciary is by the legislature. That the legislature has plenary power to create and define the powers of school corporations will hardly be challenged. That the legislature had the constitutional power to pass the Curative Act in question and that the effect of such Act was to legalize the organization and acts of all other territories which, like the one involved in this litigation, had attempted to organize a consolidated district out of school districts which included an independent district, is not and certainly could not be disputed. What reason can be urged then why the action of the legislature should not apply to this particular territory? No reason is given why it should not, as a matter of legal right. The reason announced is based on the fact that a court had happened, a few days before this Act became effective, to declare, but not to create, the then legal status of this particular territory. The legislature merely recognized the interpretation which this court, in this very action
55 had just placed on the law then in force; and the legislature, by the new Act, removed all doubt as to its intention, and sought to cure the results flowing from the former wording of the statute.

What we therefore have before us, is not the question of whether the Curative Act is invalid because it annuls or sets aside the judgment of a court, but the question of the right of a court itself to set aside and vacate an injunctional order contained in its own decree because of the enactment of a law that is concededly within the legitimate legislative sphere, and which attempts to remove that which compelled the court to render the injunctional order. No one could or would for a moment claim that this Act would not have applied to and have affected the status of this particular territory if it had gone into effect but a few days earlier—any time before such status had been judicially declared by the final judgment of the circuit court. If this Curative Act had gone into effect but a week earlier, it would have controlled the decision of the circuit court even after our remittitur had gone down; and, if such court had then, in accordance with the judgment of this court, entered the judgment it did enter, this court, upon appeal from such judgment, would have reversed the trial court. Cooley Const. Lim. (7th ed.) 544; Pennsylvania v. Wheeling Bridge Co., 18 How. 421; Brand v. Multnomah Co., 84 Am. St. Rep. 772; In re Clinton Bridge, Fed. Cas. 2900, 10 Wall 454; Sawyer v. Davis, 136 Mass. 239; Williams v. Shoudy, 4 Pac. 169; Steel Co. v. Erskine, 39 C. C. A. 173.

Why is it that the courts hold that curative legislation enacted after suit brought or even after judgment and pending appeal, controls the final determination of the action? Simply because such leg-
56 islation is not an attempted exercise of judicial power, nor an attempt to control or reverse the action of the court, but is a proper exercise of legislative functions, and its effect is simply to remove that which otherwise must control the action of the court. As stated in 2nd Lewis's Sutherland Stat. Constr. 1237:

"It is no objection to a curative act that it validates what has previously been declared invalid in a judicial proceeding. The judgment may furnish the occasion for the act. Of course, the legislature cannot annul or set aside the judgment of a court but it may remove a defect from which the judgment proceeded."

Suppose that the legislature, instead of enacting the Curative Act, had enacted a general law under which, by its mere passage and without any vote of the electors, all territories situated like this independent district and the surrounding territory, were declared consolidated school districts. That would have been a clear exercise of legislative power. No one would claim that the existing judgment would prevent the application of such Act to the particular territory included in this action; and there is certainly no reason why such judgment should be held higher in power than this Curative Act when it would not be higher in power than a general law not curative in nature. What did this court intend by its opinion on the former appeal? Certainly not to make any holding that would forbid the legislature, either by an ordinary Act or a Curative Act, to change the existing status of any school district. To attempt such a restriction on the law-making part of our government would have been an unjustifiable interference on the part of the judiciary with the law-making power of a co-ordinate branch of our government. What his court meant to do, and what the trial court by its decree did do, was to determine that this territory did not constitute a Consolidated District and, during the time such status existed, to enjoin its functioning as such.

In the case at bar plaintiffs had a right to injunctive relief at the time the action was brought because of the then law; this right, as to the future, rested solely upon the continuance of such law; this was not a vested right, and no decree of the court could make it such; it was subject to be terminated whenever the law changed. The change in the law, therefore, did not deprive anyone of a vested right to an injunction, because no one was possessed of such right—neither the parties to this particular suit nor the electors in this or any other territory containing an independent district and out of which it had been sought to create a consolidated district. The only vested right created by the judgment before us is the right to recover the costs adjudged in favor of the successful party; and no one is seeking to have such money judgment vacated. Sawyer v. Davis, supra. That a person cannot have a vested right in an injunctional order or decree is made perfectly clear by the opinions in the cases cited above.

A good test of the soundness of a legal proposition is the results that might flow therefrom. Suppose there are four groups of districts and each has attempted to organize into a Consolidated District; in each group is an Independent District; actions are brought attacking three of these attempted consolidations so that, when a Curative Act is introduced in the legislature, this situation existed: one district no contest, one district action still pending in trial court, two districts actions pending on appeal; after the Act is enacted but before it goes into effect, the two appeals are decided, and the

two causes remitted one to one circuit court, the other to another; in one circuit, the judge, knowing that such Act will go into effect in a few days and seeking to forestall the effect of the new Act, enters judgment holding the attempted organization invalid, and enjoining the territory from functioning as a Consolidated District; in the other circuit, the judge, recognizing the will of the law-
58 making power and desiring to carry same into effect, declines to enter judgment until after the Act goes into effect, and then, as he would be bound to, enters a judgment dismissing the prayer of the complaint: the result would be that, in three districts consolidation is upheld, in the other declared ineffective. Is it possible that the Curative Act, when it does go into effect, cannot apply to the territory which the court held not a Consolidated District, and this because, forsooth, such Act went into effect after such holding of the court and would be the setting aside of a judgment of such court? It would truly be a remarkable rule of law that would bring such results, and a remarkable power vested in courts whereby they might control results by hastening or delaying decisions. Under such a holding, the entering of an opinion in the very action that may have been the one first started and the one which called attention to the necessity of further legislation, renders such legislation, for all time to come, ineffective as to the territory involved in such action.

A homely illustration demonstrates the fallacy of respondents' contentions. A society has by-laws under which every man of a particular community and possessing certain qualifications becomes ipso facto, because of such qualifications, entitled to membership in such society. Among the necessary qualifications is a required physical condition. There are two men suffering from the same physical defect. One seeks admission, and he is subjected to examination by one having power to pass on the physical condition of applicants and to reject or admit them to membership. This applicant is examined and an order made wherein it is recited that he is not qualified for membership and is rejected. Thereafter, these two men are cured of their physical defect, and they then
59 both seek admission to the society. Should one be admitted and the other rejected, and this one rejected because it was a wrongful exercise of the curative powers of the doctor or surgeon to attempt to cure one who had been adjudged physically deficient and that therefore such applicant had not been cured?

When the attention of the court rendering the judgment was called to the fact that, by a proper exercise of legislative power, the status of this territory had been changed, and that, because thereof the right of respondents to the injunction had ceased, such court, not having yet lost power over such judgment, should have vacated such portion thereof as gave injunctional relief, and allowed this corporation, which had been brought into existence by the Curative Act, to function. We might well apply to the facts of this case the words of Judge Daniels in his concurring opinion in Pennsylvania v. Bridge Co., supra, where, in upholding the action of Congress, he says:

"In what has been done by Congress, I can have no doubt that they have acted wisely, justly, and strictly within their constitutional competency. By their action, they have completely overthrown every foundation upon which the decrees of this court, the orders of the circuit judge, and every motion purporting to be based upon these or either of them, could rest."

In the present case, the legislature in no manner questioned the correctness of the judgment of the court. The effect of its action is as though the legislature had said to the courts:

"You have called our attention, by your judgments, to a weakness of the law. We desired that Independent Districts might become parts of Consolidated Districts. It seems that we failed to so provide, and you have rightfully held that, as long as the present law remains, defendants should be restrained. We, however, have plenary power over school corporations, and desire that, wherever Independent Districts have attempted, with other districts, to organize Consolidated Districts, such acts shall be validated as of the date the abortive effort was made."

60 Be we ever so sensitive to legislative encroachment, we are not justified in saying that the legislature has, in this case, encroached upon the powers of the judiciary. What the legislature did was purely legislative in its nature. It did not overturn the judgment of any court, or question its correctness.

The case that is perhaps the most directly in point and in which every possible phase of this case was passed upon, is that of Steele County v. Erskine, supra. Steele County was organized out of other counties. Thereafter, its commissioners had the records of the original counties, affecting title to land in the new county, transcribed. Warrants were issued for the work. Action was brought on these warrants, and the Supreme Court of North Dakota held that the county commissioners had no authority to make the contract upon which they were based. The action was therefore dismissed at plaintiffs' costs. The next session of the legislature passed a Curative Act validating all contracts theretofore made of the nature of the one in question. Action was then brought in the United States District Court and recovery had on the claim against the county. On appeal to the Circuit Court of Appeals, the judgment was affirmed, that court adopting in full the opinion of the District Judge, which opinion fully answers every question that has been or could be raised in opposition to the relief prayed for in this action. We will not quote at length from such opinion, but the following is so clearly in point as to demand setting forth herein:

"The former judgment between these parties simply declared the contract unenforceable because it was made without legislative authority. How can such a judgment be a bar to an action upon the same contract after it has received the legislative sanction? Judgments declare the rights of parties at the time they are pronounced,

but do not preclude the assertion of rights subsequently acquired. In reply to an objection identical with that which we are now considering, the supreme court said: 'It surely cannot be seri-
61 ously urged that the legislature is stripped of its power to authorize a contract to have effect in the future by judicial interpretation of the contract, and which at the time had reference to the present and the past only. A very large proportion of the legislation in all the states is prompted by the decisions of the courts, and is intended to remedy some mischief pointed out or resulting from the utterances of the courts of the country.' City of New Orleans v. New Orleans Waterworks Co., 142 U. S. 79, 92, 12 Sup. Ct. 142, 35 L. Ed. 943."

So we may say that this curative act now before us was prompted by this very action which was then pending, and was intended to remedy that very thing in the then existing law upon which plaintiffs in this action were depending—a remedy which it was clearly within the province of the legislature to effectuate.

In Williams v. Shoudy, supra, a county issued some warrants which were invalid because certain requirements, essential to authorize their issuance, had not been complied with. An order of court was issued enjoining payment of the warrants. An election was thereafter held at which the requisite vote to authorize the issuance of such warrants was cast. It was held that this cured the original defect and that the injunctional order ceased to exist. The court, citing the Wheeling Bridge case as authority, said:

"The grounds upon and the reasons for which it [the injunction] issued no longer existed after said warrants were validated, and by reason of the changed condition, it became ineffectual."

We have not overlooked the case of Wisconsin Tel. Co. v. Krueger, 90 N. W. 458. We deem the reasoning therein unsound and the conclusion wrong. Even though it was wrongful to have the telephone pole at the particular place prior to the new law, it could become rightful under the new law. However, the court in that case justify their decision solely on the ground that there had been a judgment between private parties establishing private rights
62 and note that the case is to be distinguished from one involving public rights such as are involved in the case now before us.

Appellants, as soon as the Curative Act went into effect, might have disregarded the judgment of the circuit court and proceeded to act as officers of the Consolidated District. Such official acts might have been valid and effective—as to this we advance no opinion—but the circuit court might have been of the view that, simply because the facts upon which it based its decree had changed, was not a sufficient cause to render its decree inoperative, and might have held that, until its injunctional orders were by it set aside, those disregarding the same were punishable for contempt of court. Certainly, while the circuit court yet had jurisdiction over this cause, it

cannot be claimed that appellants did not proceed in a proper manner—one disclosing due respect to the court rendering the judgment—when they asked such court, because of the change in controlling facts, to vacate the injunctional orders. This course was pursued in the Wheeling Bridge case, supra. See order at close of opinion.

Appellants are entitled to the relief sought, and have sought same in the proper manner. The order appealed from is reversed, and the circuit court is directed to vacate the injunctional orders contained in its final judgment.

Filed in the office of the Clerk of the Circuit Court in and for Kingsbury County, S. D., this 24th day of Feb'y, A. D. 1922, and recorded in Book No. — of —, page —.

H. J. HAMILTON,
Clerk of the Circuit Court.

63 STATE OF SOUTH DAKOTA, *ss:*

In Supreme Court.

J. H. HODGES and Others, Plaintiffs and Respondents,

vs.

G. T. SNYDER and Others, Defendants and Appellants.

I, E. F. Swartz, Clerk of the Supreme Court in and for the State of South Dakota, do hereby certify that the foregoing pages numbered from 1 to 14 inclusive, contain a true and correct copy of the opinion of the Court in the above entitled cause, and of the whole thereof, as the same now remains of record in said Supreme Court.

In witness whereof I have hereunto set my hand and affixed the Seal of said Court, at Pierre, this 21st day of February, A. D. 1922.

(Signed) E. F. SWARTZ,
[SEAL.] *Clerk of the Supreme Court,*
By I. G. DE LAND,
Deputy.

Filed in the office of the Clerk of the Circuit Court in and for Kingsbury County, S. D., this 24th day of Feb'y, A. D. 1922, and recorded in Book No. — of —, page —.

H. J. HAMILTON
Clerk of the Circuit Court.

64 *Assignment of Error.*

The defendants say that there is error manifest in the face of the record in this.

The Court erred in granting the order of December 27th, 1920, denying the relief sought by defendants.

The error consists in this that the organization of the Erwin Consolidated School District had been legalized and validated
64a by the Act of June 26th, 1920, being Chapter 47 of the laws passed at the Second Special Session of the Sixteenth Legislature, said Act being approved on June 26th, 1920, and became operative and in effect on September 26th, 1920.

Argument and Brief.

During the months of March and April, 1919, certain proceedings were had for the formation of a consolidated school district in Kingsbury County, South Dakota. Such district was to include the City of Erwin, together with certain other territory. These proceedings were carried out so that on April 16, 1919, the county superintendent of schools for Kingsbury County made an order "that the said districts 31, 32, 33, 34 and 50 as designated in the plan approved for this consolidation be consolidated as provided by said Chapter 194 of the Session Laws of 1913, and laws amendatory thereto, and that the title of said consolidated district shall be Erwin Independent Consolidated District No. 1 of Kingsbury County, South Dakota."

See Complaint Record, pages 4, 5, 6.

The defendants interposed a demurrer to the complaint which was sustained by the Circuit Court. On appeal to the Supreme Court the order was reversed on the ground that the emergency
64b clause attached to Chapter 170 Laws 1919, was void and hence said — was not in force when the organization proceedings were had for the organization of their consolidated district.

(Hodges vs. Snyder 178 N. W. 575) Record page 20. On the return of the case to the Circuit Court a decree was on September 18, 1920, entered enjoining the defendants from proceeding further as a consolidated school district, etc. Record pages 21-22.

After the decision of the Supreme Court and on June 26, 1920, an act was passed and approved curing any defects in the organization of consolidated school districts being Chapter 47 of the Second Special Session of 1920, Record 26 applying the rule announced by the Supreme Court the emergency clause on this last act was void and the act did not go into effect until September 26, 1920.

After said curative act had gone into effect and on October 2, 1920, on an affidavit setting forth the facts as herein related (Record pages 19-28) and on all the records and files in the case the Court granted an order to show cause why the defendants should not be relieved from the injunction (Record 28-30). Plaintiff interposed written objection to the granting of the relief sought. Record pages 30-33.

The matter was heard by the Court on November 1, 1920, and the ruling sought by defendants was denied. Record 33-34.
64c We allege error on the ruling denying the relief.

Remedy.

In the written objections presented by plaintiffs to the granting of an order relieving defendants from the injunction no question is raised as to the method by which their relief was sought. However we call attention of the Court to the Vilas case (24 S. D. 298) in which this Court denied an application for mandamus to compel the Circuit Court to vacate an injunction (on facts very similar to the case at bar) saying that plaintiff "might have appealed from the order refusing to vacate the same (injunction) made and entered in the Circuit Court."

Relying on the Vilas case we have pursued the remedy therein indicated. The motion to vacate was made and heard during the term of the Circuit Court, at which the decree was rendered and while the whole matter was yet within the jurisdiction of the Court. Relief was granted under similar conditions on similar motion by the Supreme Court of the United States.

In State vs. Squires, 26 Iowa, 340, the Court, considering a very similar case, said:

"We have already referred to the point, that, in order to the rightful exercise of the legislative power to cure a defective
644 proceeding, the legislature must have possessed the power to authorize the result by prior legislative enactment. But it is not necessary that it might have accomplished the result in the precise manner it has adopted to cure the defect. In the case at bar, the legislature might, by a general law providing for the incorporation of independent school districts, have authorized their organization in districts having less than three hundred inhabitants, and upon less than ten days' notice. Having this power, it may rightfully legalize or cure the organization which was defective only because of a failure to comply with the particular requirements which it was competent for the legislature to have waived entirely in the original law. It was a matter of discretion with the legislature to require the performance of these precedent conditions; hence, it may waive a failure to perform them. Nor is the power of the legislature to cure defective or irregular proceedings limited by the fact, that, but for such curative act, the defective proceeding would be wholly invalid or inoperative.

Wilkinson v. Leland, 2 Peters, 661;
Satterlee v. Matthewson, id. 412;
Watson v. Mercer, 8 id.;
Cowgill v. Long, 15 111. 203;
Menges v. Wertman, 1 Penn. St. 218.

Nor is it material that a cause was pending involving the
61e question of the validity of the proceeding sought to be cured when the act curing it was passed.
Cowgill v. Long, supra;
Underwood v. Lilly, 10 Serg. & Rawle, 97;
Taggart v. McGinn, 14 Penn. St. 155;
Hepburn v. Curtz, 8 Watts, 300;
Bradder v. Brownfield, 2 Watts & Serg. 271.

It cannot be claimed that the act in controversy divests or interferes with vested rights, or that it contravenes sound public policy. But, on the contrary, it is reasonable, and conducive to the public good, in quieting litigation and otherwise, and as it does not conflict with the constitution or violate any principle of justice it should be upheld."

In Penn. v. Wheeling & Belmont Bridge Co., 18 How. 421, 15 L. Ed. 435. See final order shown at page 449 (15 L. Ed.) when the Court on motion dissolved the injunction.

Power of Legislature.

It is a sufficient answer to say that a school district is not a municipal corporation. Town of Dell Rapids v. Irving, 7 S. D. 316, 64 N. W. 149, 29 L. R. A. 861. Moreover:

"The Legislature in the exercise of its inherent plenary power may create, alter, or extend the boundaries of school districts
61f at pleasure without consulting any of the inhabitants thereof, and although it may make taxation more burdensome, such as authorizing the formation of new districts or by creating new districts by consolidating two or more districts."
Stephens v. Jones, 24 S. D. 100, 123 N. W. 707.
Nelson v. Tembeke, 178 N. W. 981.

Judicial finding of invalidity of proceedings does not impair power of legislature.

The fact that a municipal act has already been judicially declared invalid does not make its validation by the legislature an exercise of judicial power.
Erskine v. Steele County, 39 C. C. A. 173 (98 L. 215).
Gibson v. Sherman County (Neb.), 149 N. W. 107.
Guilford v. Chenango County, 13 N. Y. 143.
Wrought Iron Bridge Co. v. Attica, 119 N. Y. 204.

The enactment of a curative act pending judicial proceedings is to be sustained.
Brand v. Multnomah, 50 L. R. A. 389.
(See concluding paragraph, page 397.)

In Penn. v. Wheeling & Belmont Bridge Co., 18 How. 421—15 L. Ed. 435, the Court was considering a case where the maintenance of a bridge over the Ohio had been enjoined and later a curative act passed by Congress. The Court said:

"But it is urged that the Act of Congress ... has the effect and operation to annul the judgment of the ... rendered, or the rights determined thereby in favor of the ... This, as a general proposition, is certainly not to be denied, especially as it respects adjudications upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the Court to enforce it.

"The case before us, however, is distinguishable from this class of cases, so far as it respects that portion of the decree directing the removal of the bridge. Its interference with the free navigation of the river constituted an obstruction of a public right secured by acts of Congress.

"But, although this right of navigation be a public right common to all, yet a private party sustaining special damage by the obstruction may, as has been held in this case, maintain an action at law against the party creating it, to recover his damages; or to prevent irreparable injury, file a bill in chancery for the purpose of removing the obstruction. In both cases, the private right to damages, or to the removal, arises out of the unlawful interference with the enjoyment of the public right, which as we have seen, is under
64h the regulation of Congress. Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of Congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the Court. The decree before us, so far as it respects the costs adjudged, stands upon the same principles, and is unaffected by the subsequent law. But that part of the decree, directing the abatement of the construction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future existing or continuing obstruction depends upon the question whether or not it interferes with the right of navigation. If, in the meantime, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the Court cannot be enforced. There is no longer any interference with the enjoyment of the public right inconsistent with law, no more than there would be where the plaintiff himself had consented to it, after the rendition of the decree. Suppose the decree had been executed, and after that, the passage of the law in
64i question, can it be doubted that the defendants would have had a right to reconstruct it? And is it not equally clear that the right to maintain it, if not abated, existed from the moment of the enactment?"

We respectfully submit that the Court erred in not vacating the injunction and the order appealed from should be reversed with directions to the Circuit Court to vacate the injunction.

NULL & ROYHL,
Attorneys for Appellants.

Appellants give notice of their desire to present oral argument.

NULL & ROYHL,
Attorneys for Appellants.

64*j* *Index.*

64*k* STATE OF SOUTH DAKOTA,
In Supreme Court, ss:

J. H. HODGES et al., Plaintiffs and Respondents,

vs.

G. T. SNYDER et al., Defendants and Appellants.

I, E. F. Swartz, Clerk of the Supreme Court in and for the State of South Dakota, do hereby certify that the foregoing pages numbered from 1 to 45 inclusive, is a true and correct copy of the Appellants' Brief, duly entered and filed on the 27th day of January 1921, in the above entitled cause, and of the whole thereof, as the same now remains of record in said Supreme Court.

In witness whereof I have hereunto set my hand and affixed the Seal of said Court, at Pierre, this 12th day of April A. D., 1922.

[Seal of Supreme Court of South Dakota.]

E. F. SWARTZ,
Clerk of the Supreme Court,
By —— ——,
Deputy.

65 STATE OF SOUTH DAKOTA:

In Supreme Court, April Term, 1921.

4849.

J. H. HODGES et al., Plaintiffs and Respondents,

vs.

G. T. SNYDER et al., Defendants and Appellants.

Appeal from Circuit Court of Kingsbury County.

Honorable Alva E. Taylor, Judge.

Respondents' Brief.

Hall & Purdy, Brookings, South Dakota, Attorneys for Respondents.
Null & Royhl, Huron, South Dakota, Attorneys for Appellants.

Supreme Court, State of South Dakota. Filed Feb. 26, 1921. E. F. Swartz, Clerk.

STATE OF SOUTH DAKOTA:

In Supreme Court.

April Term, 1921.

J. H. HODGES, et al., Plaintiffs and Respondents,

vs.

G. T. SNYDER, et al., Defendants and Appellants.

Respondents' Brief.

Deeming the statement contained in appellants' brief incomplete, the respondents propose the following amendment thereto. Before the word "decree" on page 17 of appellant's brief the following should appear: After the filing of the remittitur from the supreme Court with the clerk of the circuit court, the following affidavit and order to show cause were duly served upon the attorneys for the respondents, they admitting service thereon.

* * * * * * *

65a That said affidavit and order to show cause were duly served upon defendants' attorneys, and thereupon the court made the following judgment and decree:

Before the word "affidavit" at the foot of page 20 of appellants' brief insert the following: That said judgment was duly attested,

filed and entered of record in the office of the clerk of said circuit court, September 23, 1920. That written notice of the entry of said judgment and a copy of said judgment were duly served upon respondents' counsel, they admitting service thereof, on the — day of September, 1920. That no appeal has been taken by defend-
65b ants or any of them from said judgment.

Brief and Argument.

Appellants, apparently overlooking objection numbered 5 (App. Br. p. 32) say in their brief that "no question is raised as to the method by which their (defendants') relief is sought." Said objection reads as follows:

"That the court is without jurisdiction to vacate such judgment and decree lawfully entered in the absence of fraud or mistake or any of the recognized grounds for vacating judgments, and that it cannot be thus attacked by defendants, but if aggrieved thereby they have the right to appeal therefrom to the supreme court. That the decision of the supreme court herein is res judicata of the questions herein involved."

The judgment rendered by the circuit court herein September 18, 1920 on notice, became a final judgment in the case when it was attested, filed and entered by the clerk Sept. 23, 1920, in pursuance of the decision of this court rendered June 24, 1920. (Sec. 2507 Rev. Code.) It was a final judgment, disposing of the case upon its merits, and was appealable. The alleged curative act did not become operative until September 26, 1920.

"A motion to vacate or set aside a judgment will not be
65c entertained when the proper remedy of the party aggrieved is by appeal, error, or certiorari; by a motion for a new trial in the court rendering the judgment; by mandamus requiring the court to take some action which would give the party what he seeks; by an independent action for damages; or by a bill in equity for an injunction or other relief."
35 Cyc. 890.

Obviously this application of defendants to vacate said judgment was not made upon any of the statutory grounds (Sec. 2378 Rev. Code) but upon the sole ground that a final judgment disposing of a case upon its merits can be annulled by a subsequently enacted curative act of the legislature, and the statute enforced by motion to vacate such final judgment. Defendants' counsel cite the case of Town of Vilas v. Circuit Court, 28 S. D. 298 in support of their position. In that case, however, the question before the court was not whether the judgment should be vacated on motion, nor whether an appeal would lie from the order refusing to vacate the judgment, but whether mandamus would lie to compel its vacation, and the court held that mandamus was not a proper remedy for two reasons. First: That the applicants had other adequate remedies and second:

That a showing of facts in the lower court would be necessary.

65d In so holding the court said that "plaintiff might have maintained an ordinary action in equity to vacate the former judgment and decree, or might have appealed from the order refusing to vacate the same, made and entered in the circuit court." But in that case no question appears to have been raised concerning the validity of the curative act in question, nor its effect upon the judgment, and on the previous appeal from the judgment, it was not disposed of on the merits, the appeal having been dismissed. In these material respects it differs from the case at bar. The language of the court above quoted was not necessary for the decision, as the remedy was all that was under consideration, and mandamus would not lie if any adequate remedy existed or where the discretion of the lower court was necessarily invoked. We assume therefore that what was thus said by the court concerning appeal from the order was obiter dictum.

The statute makes it the duty of the trial court to carry out the mandates of the supreme court in the following language:

"In all cases the supreme court shall remit its judgment or decision to the court from which the appeal was taken, to be enforced accordingly, and if from a judgment, final judgment shall thereupon

65e be entered in the court below in accordance therewith, except where otherwise ordered."

Sec. 3170 Rev. Code.

Generally, after a cause has been determined on appeal and remanded, the lower court is without power to * * * modify a judgment or decree entered by it in strict conformity to the mandate of the appellate court * * *."

4 C. J. 1222-3 citing in note 80: Fulton v. Krull, 151 App. Div. 142, 135 N. Y. S. 432 Key No. "Appeal & Error" No. 1199.

"Rev. St. 1878 Sec. 2832, empowering courts, within one year after notice thereof, to relieve a party from a judgment rendered against him through mistake, surprise, or excusable neglect has no application to a judgment which was affirmed by the supreme court, since section 3071 provides that, on remittment of the judgment of the supreme court, 'final judgment shall thereupon be entered in the court below in accordance therewith, except when otherwise ordered.'"

Ean v. C. M. & St. P. R. Co., 76 N. W. 329 (Wis.).

"The trial court has no jurisdiction, after a judgment has been affirmed on appeal and the remittitur has been filed to make

65f an order conditionally vacating it, bringing in new parties and allowing defendant to serve an amended answer, or do anything except to enforce it."

Crowns v. Forest Land Co., 76 N. W. 613 (Wis.).

The case of Ean v. Ry. Co., supra, involved the same principle as the present case. In that case the defendant at trial objected to

the introduction of testimony upon the ground that the complain did not state facts sufficient to constitute a cause of action. Thi objection was sustained and judgment was entered dismissing the complaint. Plaintiff appealed and the appellate court affirmed the judgment, January 12th, 1897, and on April 10th, 1897, the tria court entered an order setting aside the judgment, and from this order defendant appealed. The appellate court held, as stated above that the lower court acted without jurisdiction in the matter, and say:

"The case of Whitney v. Traynor, 76 Wis. 628, 45 N. W. 530, is to the effect that when a judgment or a part thereof is reversed, and the case is remitted for further proceedings, the trial court has no authority to grant a new trial as to any of the issues. This seems to be in accord with the uniform tenor of decisions in courts
65*g* of last resort. Couteau v. Allen, 74 Mo. 56; Young v. Thrasher, 123 Mo. 308, 27 S. W. 326; West v. Brashear, 14 Pet. 51; Chaires v. U. S., 3 How. 611; Gaines v. Rugg, 148 U. S. 228, 13 Sup. Ct. 611. The case of Patten Paper Co. v. Green Bay & M. Canal Co., 93 Wis. 283, 66 N. W. 601, and 67 N. W. 432, affirms this principle and says, in vigorous language: 'We are clearly of the opinion that a judgment entered, as this was, in substantial accordance with the mandate of this court, is, in legal effect, the judgment of this court. It is just as effectually res adjudicata as in a case where the judgment is affirmed. Reed v. Jones, 8 Wis. 421.'

The legal effect of a judgment of this court having been considered in so many cases and its finality as to any power of the court below to disturb it, having been sanctioned by such a long course of judicial decisions, it would seem not to be an open question."

To permit the Legislative Department to retroactively annul a final judgment would be an unauthorized encroachment upon the proper functions of the judicial department.

By section I of article V of the constitution of South Dakota the judicial powers of the State, except as therein otherwise pro-
65*h* vided are vested in a supreme court, circuit court, county court and justices of the peace and such other courts as may be created by law for cities a-d incorporated towns. As said by our court:

"The wise and salutary provisions in our constitution by which its framers sought to declare the distribution of the different powers of the government, and to keep them separate and distinct, is not a mere abstract truth. It is capable of a practical application by which each department may be made to operate within its own appropriate sphere, so as to accomplish the great end of securing a government of laws, and not of men."

To permit the legislative department directly or indirectly to overturn the deliberate and final judgment of the judicial department would be violative of the fundamental principles upon which our government is based and would result in inextricable confusion

The judgment rendered by the circuit court herein in conformity with the decision of this court, became a final judgment before the alleged curative act in question became operative, therefore, if the act can be given the effect for which the defendants contend in this case, no final judgment of any court, even though under the
65*i* express direction of the supreme court, will be immune from legislative reversals, and would make the legislature the court of last resort, instead of the supreme court.

Judge Cooley, in his constitutional limitations, in defining powers exercised by the legislative department, says:

"It is always competent to change an existing law by a declaratory statute, and it is no objection to its validity that it assumes the law to have been in the past what it now declares it shall be in the future, but the legislative action cannot be made to retroact upon past controversies and to reverse decisions which the courts in the exercise of their undoubted authority have made, for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would, in effect, sit as a court of review to which parties might appeal when dissatisfied with the rulings of the courts."

Cooley Const. Lim. (5th Ed.) p. 113.

"To declare what the law is or has been is judicial power, to declare what the law shall be is legislative."

Id. p. 114.

"Since the legislature does not possess and *and* cannot assume the exercise of judicial powers, it cannot interfere in any way
65*j* with pending judicial controversies. Therefore the legislature cannot annul or set aside the final judgment of a court of competent jurisdiction."

6 R. C. L., p. 162, citing: Dorsey v. Dorsey (Md.) 11 Am. Rep. 528; Denny v. Mattoon (Mass.) 79 Am. Dec. 784, hereinafter referred to at length; McCartney v. Shipherd (Ore.) 177 Pac. 814 Ann. Cases 1913 D. 1257; Ratcliffe v. Anderson (Va.) 31 Am. Rep. 716.

To the same effect are the following cases:

Kearney Co. v. Taylor (Neb.) 74 N. W. 765.
Thomas v. City of Portland (Ore.) 66 Pac. 439.
Denny v. Mattoon (Mass.) 2 Allen 361; 79 Am. Dec. 784, and cases cited in note on page 796.
Board of Commr's v. Workman (Ind.) 103 N. E. 99.
People v. Supervisors of Saginaw Co., 26 Mich. 21.

In the last above cited case the legislature of Michigan had, as in the case at bar, by indirection, sought to override decisions previously rendered by the court enjoining certain proceedings because
65*k* of their invalidity. The opinion was written by that eminent authority on constitutional law, Mr. Justice Cooley, in which the follow-ng pertinent language appears:

"Now, it is well settled that the apportionment of legislative pow
to one department of the government, will not authorize it to exe
cise any portion of the judicial power, which is apportioned to a
other department. The apportionment is, of itself, an implied pr
hibition upon its exercise by the legislature. The body, cons
quently, cannot set aside a judgment or decree, nor can it even r
quire the judiciary to give a new hearing in a case once passed upo
The line which separates judicial from legislative authority is cle
and distinct, and the principle is so well settled and understood th
it is seldom called in question and probably not often violated e
cept through inadvertence. A reference to a few of the many ca
in which it has been applied is made here by way of illustrati
merely: Lewis v. Webb, 3 Me. 326; Lane v. Dorman, 3 Scam. 2
Campbell v. Union Bank, 6 How. (Miss.) 661; Ervine's Appeal,
Penn. St. 266; Cash, Appellant, 6 Mich. 193; McDaniel v. Corn
19 Ill. 226; Denny v. Mattoon, 2 Allen, 361; Budd v. Sta
65*l* 3 Humph. 483; Wally's Heirs v. Kennedy, 2 Yerg. 5
Piequet, Appellant, 5 Pick., 64."
26 Mich. p. 27.

The case of Denny v. Mattoon, supra, is one that has been f
quently cited by the courts upon the subject of the distribution
the powers of the legislative and judicial departments, and the M
sachusetts supreme court, speaking through that eminent jurist, M
Justice Bigelow, said:

"It is the exclusive province of courts of justice to apply est
lished principles to cases within their jurisdiction, and to enfo
their decisions by rendering judgment and executing them by s
able process. The legislature have no power to interfere with t
jurisdiction in such manner as to change the decision of cases pe
ing before courts, or to impair or set aside their judgments, or t
cases out of the settled course of judicial proceeding. It is on t
principle that it has been held that the legislature have no power
grant a new trial or direct a rehearing of a cause which has be
once judicially settled. The right to review, or try anew facts wh
have determined by a verdict or decree, depends on fixed and w
settled principles, which it is the duty of the court to apply in t
exercise of sound judgment and discretion. These cannot
65*m* regulated or governed by legislative action, a fortiori, an
of the legislature cannot set aside or annul final judgme
or decrees. This is the highest exercise of judicial authority. L
Coke calls judgments and execution the 'fruit of law.' To vest
the legislature the power to take them away, or to impair their ef
on the rights of parties would be to deprive the judiciary of its m
essential prerogative. It could then no longer finally adjudi
and determine the rights of litigants. The will of the legislat
would be substituted in the place of fixed rules and established pr
ciples, by which alone judicial tribunals can be governed. T
power to correct errors, and to revise and reverse judgments, wh
in the strictest sense of the word has always been deemed essenti

judicial, would be transferred to the legislative branch of the government, even to the extent of controlling the final decrees of the tribunal of last resort. It is obvious that such an exercise of authority would lead to the entire destruction of the order and harmony of our system of government, and to a manifest infraction of one of its fundamental principles. Indeed, it is difficult to see how
65a the legislature could more palpably invade the judicial department and effectually usurp its functions, than to pass statutes which should operate to set aside or annul judgments of courts in their nature final, and which would otherwise be conclusive on the rights of parties."

In the note to the above case appearing in 79 Am. Dec. 796, numerous authorities are cited supporting the above principle.

"It is not in the power of the people of a state by the adoption of a constitutional provision, or of the legislature, by the enactment of a statute, to annul an existing final judgment * * *."

23 Cyc. 889, citing:
1 Black on Judg., Sec. 298.
Connell v. Vaughn, 40 Ga. 154.
State v. Flint (Minn.) 63 N. W. 1113.
De Shastellux v. Fairchild (Pa.) 53 Am. Dec. 570.

In the case of Ean v. Chicago etc. Railway Co., supra, the court said:

"The theory upon which our system of government was created was that the three branches—executive, legislative and judicial—should be co-ordinate and independent. The constitution provides that this shall be a court of last resort—a court whose judgments, so far as they relate to state polity, are final and conclusive.
65a Section 3071, Rev. St., provides that upon appeal from a judgment this court may reverse, affirm, or modify the judgment, and in all cases shall remit its judgments or decisions, and final judgment shall thereupon be entered in the court below in accordance therewith, except when otherwise ordered. As has been frequently stated, the judgment so entered is, in legal effect, the judgment of this court."

In the case of the State of Pennsylvania v. Wheeling etc., Bridge Co., 18 How. 421 (15 L. Ed. 435) cited by appellants, the majority opinion says:

"But it is urged that the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it."

The majority opinion then proceeds to distinguish the act under consideration, concerning the bridge in question, from the general rule, on the ground that congress had the exclusive right to prescribe what was, and what was not an unlawful obstruction
65p to navigation. In the dissenting opinions, however, this distinction is vigorously repudiated. In the dissenting opinion of Mr. Justice McLean (which is probably more frequently cited than the original opinion) he said:

"The congress and the court constitute co-ordinate branches of the government; their duties are distinct and of a different character. The judicial power cannot legislate, nor can the legislative power act judicially. The constitution has declared that the judicial power shall extend to all cases in law and equity arising under the constitution, the laws of the United States, and treaties, etc. All legislative powers are vested in congress. While these functionaries are limited to their appropriate duties as vested, there can be little or no conflict of jurisdiction."

Neither the case of Stevens v. Jones, 24 S. D. 100; 123 N. W. 707, nor Nelson v. Lembeke (S. D.) 178 N. W. 981 apply to the situation or facts involved in the case at bar, as neither one of them construes a curative statute, but merely are expressive of original legislative powers.

The case of Steele County v. Erskine, 39 C. C. A. 173, cited by appellants, is not pertinent in this case; the curative act there involved was held by the court not to have the effect of dis-
65q turbing the judgment previously rendered adjudging the contract made by the county to be void, but in a second action commenced after the curative act had been passed, the court held that the judgment in the first case was not a bar because the statute, prior to the trial of the second action had removed the legal objection to the enforcement of the contract, and the county had received the benefit of the plaintiff's services and therefore he might recover in the second action. There was no question of the legislature trespassing upon the functions of the judicial department. The same is true of the case of Gibson v. Sherman County (Neb.) 18 N. W. 107. The appeal in that case was not taken by the county which had received the benefit, but by a taxpayer, and the court said:

"The right of a taxpayer to appeal from the allowance of claims by the county board was not given by the legislature for such a purpose."

The case of the Town of Guilford v. Board of Supervisors, 13 N. Y. 143, cited by appellants is inapplicable to the issues presented by the case at bar. That case involved a question of the right of the legislature to require the payment of a special tax by a county to pay a claim which previous to the legislative enactment was not collectible. Such legislation would not be possible under
65r our constitution, however.

Likewise in the case of the Wrought Iron Bridge Company v. the Town of Attica, 119 N. Y. 204, the court held that:

"The legislature has power to legalize and validate a claim supported by a moral obligation and founded in justice against a town, which has already been declared invalid by the courts because of failure of the part of the town officers to pursue strictly the prescribed statutory proceedings."

These three last cases cited by appellants fall within an apparent exception to the general rule hereinbefore stated, based upon the principle that where a person or municipal corporation has received the benefits of the contract which for technical reasons was unenforcible, that it is competent for the legislature to remove the legal impediment to the collection of the claim, which is in itself just, and constitutes a moral obligation. No such question is presented, however, in the case at bar.

In the case of Treadway v. Schnauber (Dak.) 46 N. W. 464, the territorial Supreme Court held that an act of congress purporting to ratify, and cure the defects in the issuance of bonds, held that the bonds being void when executed could not be thus subsequently ratified, and said:

65s "It is a general principle that when an act, proceeding or transaction is void, and not merely voidable on account of some formal defect, it cannot be cured by legislative action."

No question, however, of any judgment was involved in this case. The case of Brand v. Multnomah County (Ore.) 50 L. R. A. 389, cited by appellants, was one where the legislature during the pendency of the action in the lower court had established a grade of a street, the action being one for damages by an abutting owner. The court held that this did not create an additional servitude and that the plaintiff was not entitled to damages, although such act may have been adopted after the commencement or even the decision of the present suit in the court below, citing the Wheeling Bridge case in support of its ruling. We are reluctant to admit, and do not admit, that the principle therein enunciated is good law, but the facts in that case are clearly distinguishable from those in the case at bar, and that case involved a direct appeal from the judgment and it was not therefore final, as the judgment involved in the case at bar is.

"The exercise of judicial functions by the legislature is forbidden either expressly or by implication in all the state constitutions now in force, and any act by which the legislature attempts to 65t exercise authority properly within the scope of the judicial power is unconstitutional and void."

12 C. J. 807.

Legislature Cannot by Curative Act Ratify or Validate What It Could Not Have Originally Authorized.

The general principle is thus stated:

"In general, retrospective statutes curing defects in acts done, or authorizing or confirming the exercise of powers, are valid where the legislature originally had authority to confer the powers or authorize the acts. A statute in the form of a curative act is void, however, where it attempts to impair vested rights, or to validate or confirm what the legislature could not originally have authorized."
12 C. J. 1091.

"If the thing wanting, or which failed to be done and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute."
Const. Lim. (5th Ed.) p. 458.

65*a* "But the healing statute must in all cases be confined to validating acts which the legislature might previously have authorized."
Id. 471.

The curative act in question, Chapter 47, second special session of the legislature approved June 26th, 1920, does not merely purport to ratify or cure any particular omissions or defects in proceedings for consolidation of school districts and the issuance of bonds, where the essential requirements have been complied with, but it purports to cure:

"any irregularity or errors, omissions or defects clerical in law or otherwise in the organization and incorporation thereof or any defect, ambiguity or omission, want or lack of power in the statutes authorizing such organization and incorporation * * * and all proceedings for bonding and taxation and for school purposes had therein relating to Independent Consolidated School Districts are hereby ratified, legalized and validated, notwithstanding any errors, omissions or defects, ambiguities, clerical or otherwise, or want or lack of power in the statutes in the organization and incorporation of said district."

There is no qualifying clause whatsoever in the act which would reserve to the taxpayers and citizens the right to be heard or to express themselves either upon the question of consolidation, or the issuance of bonds. It says:

65*c* "That all acts and proceedings relating and pertaining to the organization and incorporation, etc., are hereby legalized and validated as of the date when said consolidated school districts were organized and incorporated under said laws."

Therefore it purports to ratify and confirm any and all proceedings for the consolidation of schools, and issuance of bonds even though no notice was given, no petition filed, or election had. If an entirely unauthorized order of consideration was made by a county superintendent purporting to consolidate several school districts, it would be confirmed and ratified by this act, and if bonds were issued without any notice or election held, they would be ratified and confirmed. This statute was passed in evident defiance of all constitutional restrictions. In determining the validity of the statute, the test is not whether the particular proceedings claimed to be ratified were in substantial compliance with the law, but what proceedings would be cured according to the terms of the act, and if the act purports to ratify proceedings which would be clearly void under the constitution, then the statute itself is void. As shown by the record in this case a consolidation of the school districts, and the issuance of the bonds for $97,000.00 would deprive the tax payers and
65w citizens of those existing schools and the five existing school houses therein, without compensation, and would subject their taxable property to the payment of principal and interest of said bonds, besides subjecting them to the inconvenience of sending scholars for long distances to the site of the proposed consolidated school. To assert that these acts could be accomplished without giving the tax payers and citizens an opportunity to be heard, or to express themselves in opposition thereto, would be absurd. If the legislature could not have dispensed with these safeguards in an original enactment, it cannot do so by way of a curative act. It would violate the provisions of the federal and state constitutions against taking of property without due process of law, and against the taking of, or injury to property without compensation.

"Any attempt by the legislature in the form of a curative act to deprive a person of title to, or an estate in, property without his consent is void for want of due process of law. Thus an interference with private property, void for want of jurisdiction, cannot in general be validated by later legislation, nor can there be a validation, in this manner, of invalid subscriptions to stock which could not be enforced by either party."

12 C. J. 1255.

65x In the opinion by Mr. Justice Barnes in the case of Treadway v. Schnauber (Dak.), 46 N. W. 464, 470, attention is called to the distinction between that class of legislation which cures defects and legislation validating void proceedings, where the purpose to be accomplished is the collection of ordinary revenues for the support of the government or ordinary taxes for municipal purposes which do not require a vote of the taxpayers or electors who authorized the levy of the tax, and retroactive legislation to validate void proceedings which were unauthorized in the first instance unless sanctioned by a vote of the electors, and in that connection says:

"And I think the decisions are just as uniform that a legislative body can not pass a retroactive law validating void proceedings

against the will of the voters and taxpayers which alone would authorize to make the acts valid in the first instance.

That the legislature is without power to dispense with notice to the taxpayer, or deprive him of an opportunity to be heard, is an elementary proposition, requiring the citation of no supporting decisions, and it is equally well settled by the uniform current of authority that no retroactive enactment can waive or cure the want of it."

65*y* Evans v. Fall River County (S. D.), 68 N. W. 195.

In a case involving the validity of proceedings for special assessment for sewers this court said:

"The legislature is without power to declare that the steps essential to jurisdiction, the notice and hearing which constitute due process of law, shall be considered immaterial."

Haggart v. Alton (S. D.), 137 N. W. 372, 379.

"The power to tax is indeed plenary; but taxation implies public interest; and in cases like these now in question, it also implies proceedings in pais, in some of which the taxpayers have a right to take part and be heard. Any attempt to levy the burden in disregard of these principles must necessarily be inoperative.

But if anyone shall insist that this legislation is curative, he would also be called upon to show that the defects were such as were within the reach of legislation of that nature. He ought to show that they are not defects which go to the foundation of the right to tax at all in the particular case."

People v. Supervisors of Saginaw Co., 26 Mich. 21, 28.

65*z* We consider it unnecessary to review the authorities cited by appellants on page 40 of their brief, to the effect that a curative act passed during the pendency of an action can be applied to facts on the trial, as they are not applicable to the case at bar, the judgment herein having been a final one at the time that the act in question took effect, and the act itself not referring merely to a remedy.

At page 39 of their brief, appellants cite the case of Wilkinson v. Leland, 2 Peters 627; 7 L. Ed. 542, upon the proposition that the legislature may by curative acts, retroactively cure any defect in prior proceedings regardless of whether they were wholly invalid or inoperative. The case cited is historically interesting and unique. An executrix attempted to convey real estate in Rhode Island under an order made by Probate Court in New Hampshire for the sale of land to pay debts of the testator. The title being deemed bad because the courts of New Hampshire were without jurisdiction over land in Rhode Island, an agreement was entered into between the executrix and the purchaser,

"by which she bound herself to procure an act of the legislature of Rhode Island ratifying and confirming the title so granted, and on failure thereof to pay the purchase price, etc."

Upon the petition of the executrix addressed to the legis-
65aa lature it passed such act of confirmation in February, 1792. In the opinion written by Mr. Justice Story, he says:

"Rhode Island is the only state in the union which has not a written constitution of government containing its fundamental laws and institutions. Until the revolution 1776 it was governed by the Charter granted by Charles II in the fifteenth year of his reign."

This Charter granted the most ample powers to the general assembly. The statute of Rhode Island did not require notice of sale of real estate to discharge debts of decedents. The court under these circumstances held that the curative act passed by the assembly made on the petition of the executrix herself was a sufficient ratification of the previous conveyance to pass title to purchaser and said:

"We are not prepared therefore (however) to admit that the people of Rhode Island have ever delegated to their legislature the power to divest the vested rights of property and transfer them without the assent of the parties."

In the dissenting opinion by Mr. Justice Shannon in the case of Treadway v. Schnauber, 1 Dak. 271, 46 N. W. 464, he cites the above case as supporting the doctrine that:

"When these (curative) acts go no further than to bind
65bb a party by a contract which he has attempted to enter into but which was invalid because of personal inability on his part to make it or to neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law, they cannot well be obnoxious to constitutional objection."

The Wilkinson case therefore is clearly distinguishable from the case at bar for two principal reasons: First, that the curative act there involved was enacted in order to support a contract entered into by executrix. Second, the act in question was procured by the executrix herself, and enacted on her petition, and third, there being no constitution in Rhode Island of course no constitutional objection could exist to the act in question.

In conclusion we respectfully contend that the Circuit Court properly denied the defendants' application to vacate the judgment in question for the following reasons:

First. That it was a final judgment, entered in pursuance of the decision of this court prior to the time that the curative act in question became effective, and that the same is res adjudicata of the questions herein involved, and that the Circuit Court was without jurisdiction or authority to vacate said judgment on the defendants'
application, independently of the constitutional questions
65cc herein involved.

Second. That the legislative department could not by said purported curative act retroactively annul a final judgment, for the

reason that it would constitute an unauthorized encroachment upon the proper functions of the judicial department.

Third. That the legislature could not by a curative act, nor any act, dispense with jurisdictional requirements which afford citizens and taxpayers an opportunity to be heard, and assure that their property rights will not be disturbed without due process of law. And that said curative act, purporting to cure all defects in the proceedings for the consolidation of schools and issuance of bonds regardless of notice or opportunity to be heard by citizens or taxpayers is unconstitutional and void.

Notice of oral argument is hereby given.

Respectfully submitted,

HALL & PURDY,
Attorneys for Plaintiffs and Respondents,
Brookings, South Dakota.

65*dd* STATE OF SOUTH DAKOTA, *ss:*

In Supreme Court.

J. H. HODGES et al., Plaintiffs and Respondents,

vs.

G. T. SNYDER et al., Defendants and Appellants.

I, E. F. Swartz, Clerk of the Supreme Court in and for the State of South Dakota, do hereby certify that the foregoing pages numbered from 1 to 32 inclusive, is a true and correct copy of the Respondents' Brief, duly entered and filed on the 26th day of February 1921, in the above entitled cause, and of the whole thereof, as the same now remains of record in said Supreme Court.

In witness whereof I have hereunto set my hand and affixed the Seal of said Court, at Pierre, this 12th day of April, A. D. 1922.

[Seal of the Supreme Court, State of South Dakota.]

E. F. SWARTZ,
Clerk of the Supreme Court.
By —— ——,
Deputy.

66 In the Supreme Court of the State of South Dakota.

J. H. Hodges, Nick Hoffman, Walter Anderson, E. E. Ackley, C. R. Lewis, and H. M. Muser, on Behalf of Themselves and of All Other Electors and Taxpayers Similarly Situated, Plaintiffs,

vs.

G. T. Snyder, C. W. Walkow, A. O. Walkow, C. J. Noyes, and J. W. Earl, as Members of the Board of Education of the Purported Consolidated School District Named and Known as Erwin Independent Consolidated School District #1 of Kingsbury County, State of South Dakota, and C. A. Jepson, Clerk, and J. W. Kruger, Treasurer, of said Pretended Consolidated School District, and M. L. McCarty, County Superintendent of Schools of Kingsbury County, South Dakota, Defendants.

On Appeal from the Circuit Court Within and for the County of Kingsbury, in the Ninth Judicial Circuit of the State of South Dakota.

Petition for Writ of Error.

To the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, and to the Associate Justices of the Court:

The petition of J. H. Hodges, Nick Hoffman, Walter Anderson, E. E. Ackley, C. R. Lewis and H. M. Muser, on behalf of themselves and of all other electors and tax payers similarly situated, plaintiffs in the above entitled action respectfully shows:

That said action was commenced on the 12th day of June 1919 in the circuit court of Kingsbury Court, State of South Dakota by the said plaintiffs, owners of real estate, taxpayers and citizens in five certain rural or common school districts in Kingsbury County, State of South Dakota, to enjoin the above named defendants from interfering with the said existing schools maintained by the plaintiffs and other electors and taxpayers similarly situated; from purchasing a site and erecting a consolidated school building for the purported
67 Erwin Independent Consolidated School District No. 1 of Kingsbury County, South Dakota, and from issuing bonds in the sum of $97,000.00 purporting to be the obligation of said purported consolidated school district, and from assuming that said Erwin Independent Consolidated School District No. 1 is in fact or in law a consolidated school district and for general relief against the defendants, pretending to act as officers of said purported Erwin Independent Consolidated School District No. 1, who were threatening to purchase a site for a consolidated school and issue bonds of such purported consolidated school district in the sum of $97,000.00 the payment of which would be a charge against the property of the plaintiffs.

The complaint alleged facts showing several reasons why the pr
ceedings of the above named defendants and others for the creati
of said consolidated school district were null and void, and why s
bonds should not be issued, including the allegation that the statu
of the State of South Dakota did not authorize the creation of a co
solidated school district, so as to include a city, or independent sch
district, and that said purported consolidated school district did n
clude a city or independent school district, to-wit: Independe
School District No. 33 of the City of Erwin, together with said fi
rural or common school districts and therefore was null and voi
and that said defendants acting as pretended officers thereof, were
acting without legal right or authority, and threatened to issue sa
bonds.

The defendants demurred to said complaint upon the ground th
it failed to state facts sufficient to constitute a cause of action, a
the said circuit court on the 23rd day of August 1919, made an ord
sustaining said demurrer. An appeal was duly taken by plaintif
therefrom to the Supreme Court of the State of South Dakota, a
by its judgment and decision June 24, 1920 (Hodges vs. Snyder 1
N. W. 575) said Supreme Court reversed the said order a
68 held: "That the attempt to organize the Erwin Consolida
School District was not authorized by any law then in for
and that the attempted organization was wholly futile." Nothi
was left for the Circuit Court to do but to enter judgment as pray
by plaintiffs. After remittitur was sent down, judgment was,
notice, duly entered by said Circuit Court September 18, 1920, pu
suant to said judgment and decision of the Supreme Court as follo

"That the proceedings had for the consolidated school district a
the attempted creation of said Erwin Independent Consolida
School District No. 1 of Kingsbury County, State of South Dako
are null and void, and that no such consolidated school district exis
in fact or law."

and enjoining the defendants "from interfering with the condu
of the five rural school districts and the maintenance of scho
therein, and from purchasing any site or erecting any school hou
ing for said purported consolidated school district and from issui
bonds in the sum of Ninety seven thousand Dollars ($97,000.0
or any bonds whatsoever purporting to be obligations of said alle
Erwin Consolidated School District No. 1 of Kingsbury Coun
South Dakota, and from conducting or attempting to conduct sa
alleged consolidated school district, and from purporting to act
officers thereof," and that defendants did not appeal from such fi
judgment of the Circuit Court.

On June 26, 1920 at a Special session of the Legislature of sa
state, a purported Curative Act was *a* passed, which purported
ratify all acts of school, county and state officers in the organizati
of consolidated school districts and the issuance of their bonds, wh
acts the legislature would not have had power to authorize in t
first instance, which ratification was so comprehensive as to inclu

the confiscation and destruction of existing schools, school houses and property used and maintained by plaintiffs, without compensation, and the subjection of the property of the plaintiffs to special taxation for the payment of bonds without notice or opportunity to be heard as to their issuance or amount; said curative act containing no limitations or restrictions whatever, but broadly purporting to ratify all acts in the creation of consolidated school districts and issuance of bonds, in unlimited amounts, even where there was "lack of power in the statutes" and regardless of the limitations of amount of indebtedness, bonded and otherwise, imposed by the State Constitution, which curative act is in the words and figures as follows, to-wit:

"Relating to Consolidated School District and Legalizing the Same.

"An act entitled, an act to amend Section 7569 of the South Dakota Revised Code of 1919, as amended by chapter 170 of the Session Laws of 1919, relating to the consolidation of school districts, and expressly providing for the consolidation of an Independent School District and any part or all of any one or more other school district or districts, and legalizing and validating incorporation of any and all independent consolidated school districts, or districts which have consolidated, and which included an independent school district and any part or all of any one or more other school district or districts, and legalizing all proceedings for the election of officers and all acts, elections and proceedings of the officers relating to bonds, taxation and expenditures of moneys, and declaring an emergency.

"Be it enacted by the Legislature of the State of South Dakota: Section 1. That Section 7569 of the South Dakota Revised Code of 1919 as amended by Chapter 170 of the Session Laws of 1919, is hereby amended to read as follows:

Section 7569. It shall be lawful for two or more School Districts of any kind to consolidate, either by the formation of a new district or by annexation of one or more districts to an existing district in which is maintained a graded school or high school authorized by law. An existing district of any kind may organize as a consolidated district; a portion of any existing district may organize as a Consolidated District, or may consolidate with any one or more existing districts or with part or parts of same by the formation of a new district; and an Independent School District and any part or all of any one or more other School District or Districts may oragnize as a Consolidated District under the provisions of this Act and of Chapter 5 of the Revised Code of 1919. For the purpose of improving the school system of this State and encouraging industrial training, including the elements of agriculture, manual training and home economics, a centralized system of schools shall be established and maintained in every Consolidated School District organized under the provisions of this Act.

Section 2. That all acts and proceedings relating and pertain to the organization and incorporation of any Consolidated Sch District organized or attempted to be made, organized and in porated under the provisions of Chapter 5 of the Revised Cod 1919, formerly Chapter 194, Laws of 1913, and Acts amenda thereof are hereby legalized and validated, as of the date when s Consolidated School Districts were organized and incorporated der said laws, notwithstanding any irregularity or errors, omiss or defects, clerical in law or otherwise, in the organization and corporation thereof, or any defect, ambiguity or omission, want lack of power in the Statute authorizing such organization and corporation; and in all cases where a former Independent Sc District and any part or all of any one or more other School Dis or Districts have proceeded to organize as a Consolidated Dist all proceedings relating or pertaining thereto, are hereby legal and validated as of the date of any such organization or incorp tion, notwithstanding any errors, omissions or defects in the ganization or incorporation thereof, or any defect, ambiguity or o sion, want or lack of power in the Statute authorizing such organ tion and incorporation; and all of said Consolidated School Dist are hereby declared to have existed as Independent Consolid School Districts under the laws of the State of South Dakota s said organization and incorporation, and composed of the terr described and defined in the proceedings for consolidation and corporation, and all acts of the officers of said State or Count School Districts and all proceedings for bonding and taxation for school purposes had therein relating to Independent Consolid School Districts, are hereby ratified, legalized and validated, notw standing any errors, omissions or defects, ambiguities, clerical otherwise, or want or lack of power in the Statutes, in the organ tion and incorporation of said Districts.

Section 3. Whereas this Act is necessary for the immediate pre vation of the public peace and safety of the State and for the mediate support of the State Government and its existing institut an emergency is hereby declared to exist and this Act shall be in force and effect from its passage and approval.

Approved June 26, 1920."

which act is printed in the South Dakota Session Laws of 192 pages 48 and 49.

71 Under the provisions of the constitution of the Stat South Dakota said act became effective September 26, 19 and not at the time of its passage as declared by its "Emerg clause"—it having been so held by the Supreme Court herein, conceded by defendants in their brief in the Supreme Court upon appeal hereinafter mentioned.

On October 25, 1920, on application of defendants based clusively on said curative act, said circuit court made an order quiring the plaintiffs to show cause before it "Why this court sho not make an order vacating, setting aside and nullifying the de

injunction entered and made by this court in the above entitled tion, said decree of injunction being dated September 18, 1920, nd filed in the Clerk of Court's office, Kingsbury County, South akota, on the 23rd day of September 1920," and upon the hearing said order to show cause the plaintiffs presented to and filed with e court the following written objections:

"Come now the above named plaintiffs and object to the Court tting aside, or nullifying the Decree of Injunction rendered herein eptember 18, 1920, and duly filed and entered of record in the fice of the clerk of the above named court September 23, 1920, for e following reasons:

I.

That the purported curative act, Chapter 47 of the Laws of the pecial Session of 1920, did not become operative until September 26, 920, and after the entry of said judgment and decree in pursuance the decision of the Supreme Court rendered herein, dated June 4, 1920, and the legislature was without power or authority to nul- fy or impair such decree or deprive these plaintiffs of their vested ghts and interest thereunder.

II.

That said Special Act is repugnant to and in violation of the pro- isions of the Federal Constitution and the Constitution of the State South Dakota, in that it seeks to deprive persons and taxpayers property without due process of law and to impair the obligation contracts and takes private property for public use without com- pensation.

72

III.

That said Special Act is unconstitutional and void in that it purports to validate acts of persons, regardless of regularity of pro- eedings or notice to taxpayers a majority vote or opportunity to e heard in the organization of consolidated school districts and is- uance of bonds.

IV.

That such act is unconstitutional and void in that it purports to alidate such proceedings and bonds although no legal authority hatever existed for such proceedings or issuance of such bonds and hat the legislature was and is without power or authority to thus reate corporations or authorize issuance of bonds regardless of notice o or opportunity to be heard by taxpayers affected thereby and not aving authority so to do originally, it cannot ratify such unlawful cts.

V.

That the Court is without jurisdiction to vacate such judgment and decree lawfully entered in the absence of fraud or mistake nor any of

the recognized grounds for vacating judgments, and that it cannot be thus attacked by defendants, but if aggrieved thereby they have the right to appeal therefrom to the Supreme Court. That the decision of the Supreme Court herein is res judicata of the questions herein involved.

VI.

That the legislature is without power to validate acts by means of a curative statute, or otherwise, which it had not the power to enact originally, and that it did not have power originally to arbitrarily incorporate a consolidated school district, abolish and take away the property of existing school districts and issue bonds affecting taxpayers, without notice to such taxpayers or giving them an opportunity to be heard.

VII.

That the legislative department of government cannot trench upon or usurp the functions and powers of the judicial department by declaring acts to be valid which have been finally determined to be void by the Supreme Court. This would constitute a legislative reversal of a judicial decision, contrary to our federal and state constitutions and be repugnant to our theory and the fundamental principles of government.

Dated this 30th day of October, A. D. 1920;

HALL & PURDY,
Attorneys for Plaintiff.

Brooklings, S. D.

73 That on December 27, 1920 said Circuit Court made its order denying the relief sought by defendants in said order to show cause and refusing to vacate the injunctional provisions contained in its judgment entered September 18, 1920. That thereupon the defendants appealed from said order to the Supreme Court of said state, and on said appeal the said written objections of plaintiff's hereinbefore quoted, (including objections that said purported Curative Act violated the provisions of the Federal Constitution against the taking of property without due process at law, and prohibiting the taking of private property for public use without just compensation), constituted a part of the record presented to said Supreme Court on said appeal, and these plaintiffs in their brief therein raised the question of such repugnancy to the provisions of the Federal Constitution and insisted on said constitutional objections, and in said brief, in part, after quoting from said Curative Act, Chapter 47 Laws of 1920, said:

"Therefore it purports to ratify and confirm any and all proceedings for the consolidation of schools, and issuance of bonds even though no notice was given, no petition filed, or election had. If an entirely unauthorized order of consolidation was made by a county Superintendent purporting to consolidate several school districts, it

could be confirmed and ratified by this act, and if bonds were issued without any notice or election held, they would be ratified and confirmed. This statute was passed in evident defiance of all constitutional restrictions. In determining the validity of the statute, the test is not whether the particular proceedings claimed to be ratified were in substantial compliance with the law, but what proceedings would be cured according to the terms of the act, and if the act purports to ratify proceedings which would be clearly void under the constitution, then the statute itself is void. As shown by the record in this case a consolidation of the school districts, and the issuance of the bonds for $97,000.00 would deprive the tax payers and citizens of those existing schools and the five existing school houses therein, without compensation, and would subject their taxable property to the payment of principal and interest of said bonds, besides subjecting them to the inconvenience of sending scholars for long distances to the site of the proposed consolidated school. To assert that these acts could be accomplished without giving the tax payers and citizens an opportunity to be heard, or to express themselves in opposition thereto, would be absurd. If the legislature could not have dispensed with these safeguards in an original enactment, it cannot do so by way of curative act. It would violate the provisions of the federal and state constitutions against taking of property without due process of law, and against the taking of, or injury to property without compensation."

That on January 31, 1922 said Supreme Court entered judgment and rendered its opinion (Hodges vs. Snyder 186 N. W. 867) reversing the said order of the Circuit Court dated December 27, 1920 and directing said Circuit Court to "vacate the injunctional order contained in its final judgment" (referring to said judgment of September 18, 1920). Thereupon and on February 21, 1922, a remittitur was sent down to said Circuit Court accompanied with the record transmitted on said appeal and a certified copy of the said opinion of the Supreme Court. That the Supreme Court did not in its opinion expressly refer to said constitutional objections thus squarely presented by plaintiffs to it on said appeal and to the trial court, but that its judgment and opinion are based exclusively upon the alleged validity of said Curative Act, and its said judgment and decision, could not have been entered or made in favor of defendants had it not found that said Curative Act was valid, over the plaintiff's said objections.

That thereafter, and on March 20, 1922, judgment was entered by said Circuit Court in pursuance of said mandate and judgment of the Supreme Court and providing as follows:

"That the opinion and judgment of the Supreme Court entered herein on the 31st day of January 1922, be and is hereby made the opinion and judgment of this court, and in pursuance thereof it is hereby ordered, adjudged and decreed that all that part of said judgment enjoining and restraining the defendant as hereinbefore recited (referring to said judgment of the Circuit court rendered

September 18, 1920) be and the same is hereby in all things vacated and set aside."

That the Supreme Court of the State of South Dakota is the highest court in said state in which a final judgment could or can be had in this case, and the Circuit Court is the Court of general original jurisdiction in cases at law and in equity, and
75 that under the statutes, court rules and practice in said courts the Supreme Court, upon the expiration of twenty days from rendering its judgment and opinion sent its remittitur, the judgment opinion and the record on appeal as aforesaid to the said Circuit Court from which the appeal was taken, for enforcement, where such record now remains.

Petitioners further show that a Federal question was made in said case hereinbefore set out, and that said judgment of said Supreme Court of January 31, 1922 was repugnant to and in conflict with the provisions of the Fourteenth Amendment to the Constitution of the United States prohibiting any state from depriving any persons of property without due process at law, and the provisions of the Fifth Amendment prohibiting the taking of private property for public use without just compensation, and that a decision of said federal question was necessary to the judgment rendered.

Wherefore petitioners pray that a Writ of Error be allowed directed to the Circuit Court of Kingsbury County in the Ninth Judicial Circuit of the State of South Dakota, and that a transcript of the record proceedings and papers upon which said judgment of the Supreme Court and the resulting judgment in said Circuit Court were rendered, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C. under the rules of such Court in such case made and provided, and that the same may be by the Honorable Court inspected and corrected in accordance with law and justice, and that the judgments of said Supreme Court of the State of South Dakota, and the Circuit Court of Kingsbury County State of South Dakota, be reversed.

Dated this 15th day of April, 1922.

PHILO HALL,
Brookings, South Dakota;
SAMUEL HERRICK,
Attorneys and of Counsel for Petitioners.

Writ of error allowed and amount offered for costs fixed at $500.00
April 28, 1922.
WILLIS VAN DEVANTER,
Associate Justice.

[Endorsed:] Filed in the office of the Clerk of the Circuit Court in and for Kingsbury County, S. D. this 10th day of May, A. D. 1922 and recorded in Book No. — of —, page #—. H. J. Hamilton, Clerk of the Circuit Court.

76 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Circuit Court within and for the County of Kingsbury in the Ninth Judicial Circuit of the State of South Dakota, (being possessed of the record upon a remittitur from the Supreme Court of the State of South Dakota), Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between J. H. Hodges, Nick Hoffman, Walter Anderson, E. E. Ackley, C. R. Lewis and H. M. Muser, on behalf of themselves and of all other electors and taxpayers similarly situated, plaintiffs, and G. T. Snyder, C. W. Walkow, A. O. Walkow, C. J. Noyes and J. W. Earl, as members of the Board of Education of the purported consolidated School District, named and known as Erwin Independent Consolidated School District #1 of Kingsbury County, State of South Dakota, and C. A. Jepson, Clerk, and J. W. Kruger, Treasurer, of said pretended consolidated School District, and M. L. McCarty, County Superintendent of Schools of Kingsbury County, South Dakota, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution,
77 treaties or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said plaintiffs, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within — days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-eighth day of April, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

Allowed by
WILLIS VAN DEVANTER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Original. 100—536—2223. Original. Supreme Court of the United States, October Term, 191-. Hodges et al. vs. Snyder et al. Writ of Error. Filed in the office of the Clerk of the Circuit Court in and for Kingsbury County, S. D. this 4th day of May A. D. 1922 and recorded in Book No. — of —, page —. H. J. Hamilton, Clerk of the Circuit Court.

78 Original.

UNITED STATES OF AMERICA, *ss:*

To G. T. Snyder, C. W. Walkow, A. O. Walkow, C. J. Noyes and J. W. Earl, as members of the Board of Education of the purported consolidated School District, named and known as Erwin Independent Consolidated School District #1 of Kingsbury County, State of South Dakota, and C. A. Jepson, Clerk, and J. W. Kruger, Treasurer, of said pretended consolidated School District, and M. L. McCarty, County Superintendent of Schools of Kingsbury County, South Dakota, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court within and for the County of Kingsbury, in the Ninth Judicial Circuit of the State of South Dakota, (being possessed of the record upon a remittitur from the Supreme Court of the State of South Dakota), wherein J. H. Hodges, Nick Hoffman, Walter Anderson, E. E. Ackley, C. R. Lewis and H. M. Muser, on behalf of themselves and of all other electors and taxpayers similarly situated, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Willis Van Devanter, Associate Justice of the Supreme Court of the United States, this twenty-eighth day of April, in the year of our Lord one thousand nine hundred and twenty-two.

WILLIS VAN DEVANTER,
Associate Justice of the Supreme Court of the United States.

We, the undersigned attorneys of record for the defendants in the within entitled action in the Circuit Court of Kingsbury County, South Dakota, and in the Supreme Court of the State of South Dakota, hereby acknowledge service of the within citation at Huron, South Dakota, this 8th day of May, 1922, by true copy thereof and hereby waive service thereof upon the defendants and each of them personally.

NULL & ROYHL,
Attorneys of Record for Defendants in the Circuit Court of Kingsbury County, South Dakota, and the Supreme Court of the State of South Dakota.

[Endorsed:] Original Citation. 100/2223/536. Citation. Filed in the office of the Clerk of the Circuit Court in and for Kingsbury County, S. D., this 10th day of May, A. D. 1922, and recorded in Book No. — of ——, page —. H. J. Hamilton, Clerk of the Circuit Court.

79 In the Supreme Court of the State of South Dakota.

J. H. HODGES, NICK HOFFMAN, WALTER ANDERSON, E. E. ACKLEY, C. R. Lewis, and H. M. Muser, on Behalf of Themselves and of All Other Electors and Taxpayers Similarly Situated, Plaintiffs,

vs.

G. T. SNYDER, C. W. WALKOW, A. O. WALKOW, C. J. NOYES, and J. W. Earl, as Members of the Board of Education of the Purported Consolidated School District Named and Known as Erwin Independent Consolidated School District #1 of Kingsbury County, State of South Dakota, and C. A. Jepson, Clerk, and J. W. Kruger, Treasurer, of said Pretended Consolidated School District, and M. L. McCarty, County Superintendent of Schools of Kingsbury County, South Dakota, Defendants.

On Appeal from the Circuit Court Within and for the County of Kingsbury, in the Ninth Judicial Circuit of the State of South Dakota.

Assignment of Errors.

That the Supreme Court of the State of South Dakota erred in rendering its decision and entering judgment herein, dated January 31, 1922, reversing the order of the Circuit Court within and for the County of Kingsbury and State of South Dakota, dated December 27, 1920 and vacating the injunctional provisions contained in the final judgment of said Circuit Court of Kingsbury County, entered September 18, 1920 for the following reasons and upon the following grounds:

I.

That said judgment and decisions of the Supreme Court of the State of South Dakota was based exclusively upon the alleged validity of the purported Curative Act, passed by the Legislature of the State of South Dakota, June 26, 1920 and becoming effective September 26, 1920, contained in Chapter 47 of the Laws of the Special session of the Legislature of South Dakota for 1920, and that said special act is repugnant to the provisions of the Fourteenth Amendment of the Constitution of the United States prohibiting the taking of property without due process at law, and that as applied to the admitted facts alleged in the plaintiff's complaint herein, said Curative Act
80 purports to retroactively confiscate five existing schools and school houses and property owned and maintained by the plaintiffs as taxpayers and property owners, without compensation,

and to subject their property to special taxation for the payment of $97,000.00 in bonds, without notice or opportunity to be heard, either as to issuance or amount.

II.

That the final judgment rendered by the Circuit Court within and for the County of Kingsbury and State of South Dakota, herein September 18, 1920, pursuant to the prior decision and judgment of said Supreme Court of the State of South Dakota, made and rendered June 24, 1920 established vested rights, property and immunities in these plaintiffs of which they could not be lawfully deprived by the said Curative Act, and that said act was an unwarranted legislative attempt to deprive plaintiffs of such rights, property and immunities in violation of the provision of the Fourteenth Amendment to the Federal Constitution against the taking of property without due process of law.

III.

That the said Supreme Court of the State of South Dakota erred in failing to sustain the objections of the plaintiffs to the validity and effect of said Curative Act duly presented to the Circuit Court of said Kingsbury County, State of South Dakota, at the hearing of the Order to Show cause, and also duly presented to the said Supreme Court on appeal from the order of said Circuit Court, made on said hearing, which objections, set forth in plaintiff's petition for writ of error herein, squarely presented for the decision of said Supreme Court of the State of South Dakota the said questions concerning the conflict of said Curative Act with the said provisions of the
81 Federal constitution, against the taking of property without due process of law, and the taking of private property for public use without compensation.

IV.

That said Curative Act is repugnant to the provisions of the Fifth and Fourteenth Amendments of the Constitution of the United States in that it purports to ratify all acts of school, county and state officers in the organization of consolidated school districts and the unrestricted and unlimited issuance of their bonds in a manner so comprehensive as to ratify the confiscation and destruction of existing schools, school houses and property used and maintained by plaintiffs without compensation and the subjection of their property to special taxation for the payment of bonds without notice or opportunity to be heard as to their issuance or amount. That said Curative Act contained no limitations or restrictions whatsoever for the protection of taxpayers and property owners, but broadly purported to ratify all acts in the creation of consolidated school districts, and issuance of bonds in unlimited amounts, and regardless of limitations imposed by the State Constitution concerning indebtedness, bonded and otherwise

and that the legislature purported to ratify and cure acts which it could not have originally authorized.

V.

That the said Circuit Court within and for the County of Kingsbury and State of South Dakota erred in rendering its judgment dated March 20, 1922, in pursuance of the said judgment and decision of the Supreme Court of the State of South Dakota rendered January 31, 1922, upon each of the grounds and for each of the reasons hereinbefore specified for repugnancy to the provisions of the
82 Fifth and Fourteenth Amendments of the Federal Constitution against the taking of property without due process of law and prohibiting the taking of private property for public use without just compensation, and being based, as was the said judgment and decision of the Supreme Court, exclusively upon the alleged validity of said Curative Act, Chapter 47 Laws of Special session of Legislature of South Dakota for 1920.

Wherefore plaintiffs pray the reversal of said judgment and decision of the Supreme Court of the State of South Dakota rendered and made January 31, 1922 and the resulting judgment of the said Circuit Court for Kingsbury County, State of South Dakota entered in pursuance thereof March 20, 1922.

Dated April 15th, 1922.

PHILO HULL,
Brookings, South Dakota;
SAMUEL HERRICK,
Attorneys and of Counsel for Plaintiffs and Petitioners for Writ of Error.

[Endorsed:] 100/2223/536. Filed in the office of the Clerk of the Circuit Court in and for Kingsbury County, S. D., this 10th day of May, A. D. 1922, and recorded in Book No. — of ——, page —. H. J. Hamilton, Clerk of the Circuit Court.

83 In the Supreme Court of the State of South Dakota.

J. H. HODGES, NICK HOFFMAN, WALTER ANDERSON, E. E. ACKLEY, C. R. Lewis, and H. M. Muser, on Behalf of Themselves and of all Other Electors and Taxpayers Similarly Situated, Plaintiffs,

vs.

G. T. SNYDER, C. W. WALKOW, A. O. WALKOW, C. J. NOYES, and J. W. Earl, as Members of the Board of Education of the Purported Consolidated School District Named and Known as Erwin Independent Consolidated School District #1 of Kingsbury County, State of South Dakota, and C. A. Jepson, Clerk, and J. W. Kruger, Treasurer of said Pretended Consolidated School District, and M. L. McCarty, County Superintendent of Schools of Kingsbury County, South Dakota, Defendants.

Precipe.

To the Clerk of Circuit Court within and for the County of Kingsbury and State of South Dakota.

SIR:

Please incorporate in the transcript of the record upon Writ of error to the United States Supreme Court in the above entitled action, the following documents.

1. Summons and return of service.

2. Complaint.

3. Demurrer to Complaint.

4. Order sustaining demurrer to complaint.

5. Assignment of errors to above order.

6. Judgment (remittitur) of Supreme Court rendered June 24, 1920 reversing order sustaining demurrer, (omit items of costs).

7. Opinion of Supreme Court filed June 24, 1920.

8. Order to show cause why final judgment should not be entered in Circuit Court dated August 4, 1920, and admission of service thereon.

9. Affidavit of Philo Hall upon which last mentioned order was based.

10. Final Judgment of Circuit Court dated September 18, 1920 and filing thereof.

11. Affidavit of M. L. McCarty sworn to October 16, 1920.

12. Order to Show cause dated October 25, 1920 why decree of injunction should not be vacated.

13. Plaintiff's written objections to granting of Order to set aside decree of injunction dated October 30, 1920 presented by plaintiffs to Circuit Court on hearing and set forth pages 30-33 inclusive of Defendant's brief in Supreme Court on their appeal.

84 14. Order of Circuit dated December 27, 1920 denying relief sought by defendants under said order to show cause.

15. Judgment (remittitur) of Supreme Court dated January 31, 1922.

16. Opinion of Supreme Court filed January 31, 1922.

17. Copy of Appellants' printed Brief on last appeal to Supreme Court certified to by Clerk of Supreme Court.

18. Copy of Respondents' printed Brief on last appeal to Supreme Court, certified to by Clerk of Supreme Court.

19. Petition for Writ of Error.

20. Writ of Error to Supreme Court of the United States.

21. Citation.

22. Assignment of Errors.

(NOTE.—Please omit title in papers except in summons.)

Dated at Brookings, South Dakota, May 5, 1922.

SAMUEL HERRICK,
Westory Building, Washington, D. C.;
PHILO HULL,
WALLACE E. PURDY,
Brookings, South Dakota,
Attorneys for Plaintiffs in Error.

Due and personal service of the within and foregoing Precipe is hereby admitted at Huron, South Dakota, this 8th day of May, 1922.

NULL & ROYHL,
Attorneys for Defendants.

[Endorsed:] 100. 2223. 536. Precipe. Filed in the office of the Clerk of the Circuit Court in and for Kingsbury County, S. D., this 10th day of May A. D. 1922, and recorded in Book No. — of —page —. H. J. Hamilton, Clerk of the Circuit Court.

85 Know all men by these presents, that we, J. H. Hodges, Nick Hoffman, Walter Anderson, E. E. Ackley, C. R. Lewis and H. M. Muser, as principals, and The National Surety Company, a corporation of the State of New York, as sureties, are held and firmly bound unto G. T. Snyder, C. W. Walkow, A. O. Walkow, C. J. Noyes, J. W. Earl, C. A. Jepson, J. W. Kruger and M. L.

McCarty, in the full and just sum of five hundred dollars ($500 *dollars*, to be paid to the said G. T. Snyder, C. W. Walkow, A. O. Walkow, C. J. Noyes, J. W. Earl, C. A. Jepson, J. W. Kruger and M. L. McCarty certain attorney, executors, administrators, or assigns to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 29th day of April in the year of our Lord one thousand nine hundred and twenty-two.

Whereas, lately at a general term of the Supreme Court of the State of South Dakota in a suit depending in said Court, between said J. H. Hodges et al. and G. T. Snyder et al. a decision was rendered against the said J. H. Hodges et al. and the said J. H. Hodges et al. having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the decision in the aforesaid suit, and a citation directed to the said G. T. Snyder et al. citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within — days from the date thereof.

Now, the condition of the above obligation is such, That if the said J. H. Hodges et al. shall prosecute their writ to effect, and answer all damages and costs if they fail to make their plea good then the above obligation to be void; else to remain in full force and virtue.

J. H. HODGES,
NICK HOFFMAN,
WALTER ANDERSON,
E. E. ACKLEY,
C. R. LEWIS,
H. M. MUSER,
By SAMUEL HERRICK, [SEAL.]
Their Attorney.
NATIONAL SURETY CO., [SEAL.]
By W. H. RONSAVILLE, [SEAL.]
Attorney-in-fact.

Sealed and delivered in presence of—
R. N. BOORMAN.
B. M. YORKDALE.
A. C. HOLSOPPLE.

Approved by—
WILLIS VAN DEVANTER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] 100. 536. 2223. Bond. Filed in the office of the Clerk of the Circuit Court in and for Kingsbury County, S. D. this 4th day of May, A. D. 1922, and recorded in Book No. 2 of Bond & Letter Record, page 482. H. J. Hamilton, Clerk of the Circuit Court.

86 STATE OF SOUTH DAKOTA,
County of Kingsbury:

In Circuit Court, Ninth Judicial Circuit.

J. H. HODGES, NICK HOFFMAN, WALTER ANDERSON, E. E. ACKLEY, C. R. Lewis, and H. M. Muser, on Behalf of Themselves and of All Other Electors and Taxpayers Similarly Situated, Plaintiffs,

vs.

G. T. SNYDER, C. W. WALKOW, A. O. WALKOW, C. J. NOYES, and J. W. Earl, as Members of the Board of Education of the Purported Consolidated School District Named and Known as Erwin Independent Consolidated School District #1 of Kingsbury County, State of South Dakota, and C. A. Jepson, Clerk, and J. W. Krueger, Treasurer of said Pretended Consolidated School District, and M. L. McCarty, County Superintendent of Schools of Kingsbury County, South Dakota, Defendants.

Certificate of Clerk of Circuit Court.

STATE OF SOUTH DAKOTA,
County of Kingsbury, ss:

I, H. J. Hamilton, Clerk of the Circuit Court within and for the County of Kingsbury and State of South Dakota, do hereby certify that the foregoing documents hereto attached including pages 1 to 85 inclusive (one number for each copy of printed briefs) are full, true and correct copies of the originals thereof in the above entitled action on file and of record in my office and in my lawful custody, with the exception of the printed copies of "Appellants' Brief in Supreme Court" No. 17, and "Respondents' Brief in Supreme Court" No. 18 in the Precipe, and that said briefs are duly certified to by the Clerk of the Supreme Court of said State, and that the annexed Petition for Writ of Error, Writ of Error, Citation, Assignment of Errors and Bond herewith attached at pages 66 to 82 inclusive and 85 respectively are the originals. The documents hereto attached being as follows, to-wit:

87 1. Summons and return of service.

2. Complaint.

3. Demurrer to Complaint.

4. Order sustaining demurrer to complaint.

5. Assignment of errors to above order.

6. Judgment (remittitur) of Supreme Court rendered June 24, 1920 reversing order sustaining demurrer, (omit items of costs).

7. Opinion of Supreme Court filed June 24, 1920.

8. Order to show cause why final judgment should not be entered in Circuit Court dated August 4, 1920, and admission of service thereon.

9. Affidavit of Philo Hall upon which last mentioned order was based.

10. Final judgment of Circuit Court dated September 18, 1920 and filing thereof.

11. Affidavit of M. L. McCarty sworn to October 16, 1920.

12. Order to Show Cause dated October 25, 1920 why decree of injunction should not be vacated.

13. Plaintiffs' written objections to granting of Order to set aside decree of injunction dated October 30, 1920 presented by plaintiffs to Circuit Court on hearing and set forth on pages 30-33 inclusive of Defendants' brief in Supreme Court on their appeal.

14. Order of Circuit Court dated December 27, 1920 denying relief sought by defendants under said order to show cause.

15. Judgment (remittitur) of Supreme Court dated January 31, 1922.

16. Opinion of Supreme Court filed January 31, 1922.

17. Copy of Appellants' printed Brief on last appeal to Supreme Court certified to by Clerk of Supreme Court.

18. Copy of Respondents' printed Brief on last appeal to Supreme Court, certified to by Clerk of Supreme Court.

19. Petition for Writ of Error.

20. Writ of Error to Supreme Court of the United States.

21. Citation and admission of service endorsed thereon.

22. Assignment of Errors.

23. Precipe and admission of service endorsed thereon.

24. Bond.

That in some instances I have omitted the full title from said copies, for brevity, but in other respects they are full copies of the originals, and the foregoing constitutes the entire transcript in the cause.

I further certify that under the statutes, court rules and practice in this state, at the expiration of twenty days after judgment in the Supreme Court, if no petition for re-hearing is filed, the entire record on appeal in Supreme Court is returned to the Circuit Court from which the appeal is taken, and there remains on file with the Clerk thereof, for enforcement in said Circuit Court.

In witness whereof I have hereunto subscribed my name and affixed the seal of said Circuit Court at De Smet, Kingsbury County, State of South Dakota, this 23rd day of May, 1922.

[Seal of Circuit Court, Kingsbury County, South Dakota.]

H. J. HAMILTON,
Clerk of the Circuit Court within and for the County of Kingsbury and State of South Dakota.

88 In the Supreme Court of the United States, October Term, 1922.

#432.

J. H. HODGES et al.

vs.

G. T. SNYDER et al.

Stipulation Concerning Printing of Record.

In order to reduce the contents of the printed record herein and to avoid duplication it is hereby stipulated and agreed by and between the parties hereto that the following parts of the transcript, transmitted to the Clerk of said Court, may be omitted and references to such omitted portions made as follows: (or that in substance).

1. Omit officer's return on Summons, page 2 Transcript, in lieu thereof state that the Summons and Complaint were duly and personally served in said county of Kingsbury on the Defendants June 12, 1919.

2. Omit the taxation of Costs in Supreme Court appearing at page 18, of Trans.

3. Omit the following portions of Appellants' Printed Brief on appeal to Supreme Court (Brief of Defendant- in Error herein), appearing at page 64 of trans, to wit: pages 1 to 35 inclusive, to and including Folio 104, and in lieu thereof print a statement in the record showing that said Appellants' printed brief here contained the Complaint, Demurrer to the Complaint, Judgment and Decree of the Circuit Court, dated September 18, 1920, Affidavit of M. L. McCarty, the Order to Show Cause, issued by the Circuit Court, dated October 25, 1920, the written objections filed in and presented to the Circuit Court on the hearing of said Order to Show Cause by Plaintiffs in Error herein, and the Order denying the relief sought by the Defendants dated December 27, 1920, heretofore appearing in the record. The following portion of said Appellants' printed brief may also be omitted:

89 4. The following parts of Respondents' printed brief (brief of Plaintiffs in Error herein), in the Supreme Court of the State of South Dakota, appearing at page 65 of Transcript, may be omitted: The Affidavit of Philo Hall and Order to Show Cause appearing at pages 1-4 of said printed brief, and in lieu thereof state in substance that the Respondents' printed Brief here set forth the affidavit of Philo Hall and Order to Show Cause, dated August 4, 1920, issued by the Circuit Court which appear at pages 31-32 and 36 of the trans.

Dated at Brookings and Huron, South Dakota this 11th day of July, 1922.

SAMUEL HERRICK,
HALL & PURDY,
Attorneys for Plaintiff- in Error.
T. H. NULL,
Attorneys for Defendant- in Error.

90 [Endorsed:] File No. 28982. Supreme Court U. S. October Term, 1922. Term No. 432. J. H. Hodges et al. Appellants, vs. G. T. Snyder et al. Stipulation to omit parts of record in printing. Filed July 25, 1922.

Endorsed on cover: File No. 28982. S. Dakota Circuit Court of Kingsbury County, Ninth Judicial Circuit. Term No. 432. J. H. Hodges, Nick Hoffman, Walter Anderson, et al., &c., plaintiffs in error, vs. G. T. Snyder, C. W. Walkow, A. O. Walkow, et al., as members of the board of education of the purported consolidated school district named and known as Erwin Independent Consolidated School District Number 1 of Kingsbury County, South Dakota et al., &c., et al. Filed June 14th, 1922. File No. 28982.

Motion To Dismiss Or Affirm

[redacted]

Office Supreme Court
FILED
FEB 24 19
WM. R. STANS
C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

No. 432

J. H. HODGES, NICK HOFFMAN, WALTER ANDERSON, ET AL., &c., PLAINTIFFS IN ERROR,

vs.

G. T. SNYDER, C. W. WALKOW, A. O. WALKOW, ET AL., AS MEMBERS OF THE BOARD OF EDUCATION OF THE PURPORTED CONSOLIDATED SCHOOL DISTRICT NAMED AND KNOWN AS ERWIN INDEPENDENT CONSOLIDATED SCHOOL DISTRICT No. 1 OF KINGSBURY COUNTY, SOUTH DAKOTA, ET AL., &c., ET AL.

IN ERROR TO THE CIRCUIT COURT OF KINGSBURY COUNTY, NINTH JUDICIAL CIRCUIT, OF THE STATE OF SOUTH DAKOTA.

FILED JUNE 14, 1922.

(28,982)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

No. 432

J. H. HODGES, NICK HOFFMAN, WALTER ANDERSON, E. H. ACKLEY, C. R. LEWIS, and H. M. MUSER, on Behalf of Themselves and of All Other Electors and Taxpayers Similarly Situated,

Plaintiffs in Error,

vs.

G. T. SNYDER, C. W. WALKOW, A. O. WALKOW, C. J. NOYES, and J. W. EARL, as Members of the Board of Education of the Purported Consolidated School District Named and Known as Erwin Independent Consolidated School District No. 1 of Kingsbury County, South Dakota, and C. A. Jepson, Clerk, and J. W. Kruger, Treasurer, of Said Pretended Consolidated School District, and M. L. McCarty, County Superintendent of Schools of Kingsbury County, South Dakota,

Defendants in Error.

NOTICE

IN ERROR TO THE CIRCUIT COURT OF KINGSBURY COUNTY, NINTH JUDICIAL CIRCUIT, OF THE STATE OF SOUTH DAKOTA.

TO MESSRS. PHILO HALL, Brookings, South Dakota, and SAMUEL HERRICK, of Washington, D. C., ATTORNEYS AND COUNSEL FOR PLAINTIFFS IN ERROR:

PLEASE TAKE NOTICE: That on Monday, the 26 day of February, A. D. 1923, at the opening of the Court, or

as soon thereafter as Counsel can be heard, the motions, of which the foregoing are copies, will be admitted to the Supreme Court of the United States for the decision of said Court thereon.

Annexed hereto is a copy of the Brief of Argument to be submitted with the said Motions in support thereof.

T. H. NULL,

MAX ROYHL,

Counsel for Defendants in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

No. 432

J. H. HODGES, NICK HOFFMAN, WALTER ANDERSON, E. H. ACKLEY, C. R. LEWIS, and H. M. MUSER, on Behalf of Themselves and of All Other Electors and Taxpayers Similarly Situated,

Plaintiffs in Error,

vs.

G. T. SNYDER, C. W. WALKOW, A. O. WALKOW, C. J. NOYES, and J. W. EARL, as Members of the Board of Education of the Purported Consolidated School District Named and Known as Erwin Independent Consolidated School District No. 1 of Kingsbury County, South Dakota, and C. A. Jepson, Clerk, and J. W. Kruger, Treasurer, of Said Pretended Consolidated School District, and M. L. McCarty, County Superintendent of Schools of Kingsbury County, South Dakota,

Defendants in Error.

MOTION TO DISMISS OR AFFIRM

IN ERROR TO THE CIRCUIT COURT OF KINGSBURY COUNTY, NINTH JUDICIAL CIRCUIT, OF THE STATE OF SOUTH DAKOTA.

Comes now the Defendants in Error by their Counsel appearing in that behalf, and moves the Court to dismiss the Writ of Error in the above entitled cause for want of jurisdiction because the Decree from which the said Writ of Error purports to have been taken is the Decree of an

inferior Court of the State of South Dakota, and because the Final Decree in said cause was entered in the Supreme Court of the State of South Dakota, and that the Writ of Error is not directed to said Supreme Court;

And the said Defendants in Error, by Counsel as aforesaid, also moves the Court to affirm the said Decree from which said Writ of Error purports to have been sued out, because although the record in said cause may show that this Court has jurisdiction in the premises, yet it is manifest that said appeal was taken for delay only and presents no substantial question for review.

T. H. NULL,

MAX ROYHL,

Counsel for Defendants in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

No. 432

J. H. HODGES, NICK HOFFMAN, WALTER ANDERSON, E. H. ACKLEY, C. R. LEWIS, and H. M. MUSER, on Behalf of Themselves and of All Other Electors and Taxpayers Similarly Situated,

Plaintiffs in Error,

vs.

G. T. SNYDER, C. W. WALKOW, A. O. WALKOW, C. J. NOYES, and J. W. EARL, as Members of the Board of Education of the Purported Consolidated School District Named and Known as Erwin Independent Consolidated School District No. 1 of Kingsbury County, South Dakota, and C. A. Jepson, Clerk, and J. W. Kruger, Treasurer, of Said Pretended Consolidated School District, and M. L. McCarty, County Superintendent of Schools of Kingsbury County, South Dakota,

Defendants in Error.

BRIEF OF ARGUMENT IN SUPPORT OF THE MOTIONS TO DISMISS OR AFFIRM

IN ERROR TO THE CIRCUIT COURT OF KINGSBURY COUNTY, NINTH JUDICIAL CIRCUIT, OF THE STATE OF SOUTH DAKOTA.

STATEMENT OF THE CASE

During the months of March and April, 1919, proceedings were had in accordance with Section 7569, Revised Code of South Dakota, as amended by Chapter 170, Laws of 1919, (Session Laws 1919, page 157), which proceedings

resulted in a final order of the County Superintendent of Schools for Kingsbury County, dated April 16, 1919, declaring the organization of "Erwin Independent Consolidated School District No. 1 of Kingsbury County." The order of the Superintendent appears on pages 3 and 4 of the Record.

The sections of the statute involved are as follows:

"It shall be lawful for two or more school districts of any kind to consolidate, either by the formation of a new district or by annexation of one or more districts to an existing district in which is maintained a graded school or high school authorized by law. An existing district of any kind may organize as a consolidated district; a portion of any existing district may organize as a consolidated district, or may consolidate with any one or more existing districts or with part or parts of same by the formation of a new district. For the purpose of improving the school system of this state and encouraging industrial training, including the elements of agriculture, manual training and home economics, a centralized system of schools shall the established and maintained in every consolidated school district organized under the provisions of this chapter.

"Section 2. Whereas, this act is necessary for the immediate support of the state government and its existing institutions, an emergency is hereby declared to exist and this act shall be in full force and effect from and after its passage and approval.

"Approved February 27, 1919."

The chapter in the Code of 1919, of which Section 7569 forms a part, relates to the organization of consolidated school districts, and prescribes the proceedings to be had for the organization of such districts.

In the case of Isaacson vs. Parker, 42 S. D., page 562, the Supreme Court of South Dakota held that the words in the Act of 1913, being the same section as 7569 prior to amendment: "Two or more school districts of any kind may consolidate," applied only to rural school districts, and did not include an independent school district.

Section 7569 as it appears in the Revised Code of 1919, reads: "Two or more common school districts may consolidate." By the Amendment of 1919, hereinbefore quoted, the clause reads: "Two or more school districts of any kind." The Act of 1919, amending Section 7569, was passed with an emergency clause attached, declaring the act to be in effect upon its passage and approval.

Erwin Independent Consolidated School District was formed by consolidating certain school districts, including City of Erwin Independent District.

The present suit was begun in June, 1919, to enjoin the Defendants in Error from acting as officers of the Consolidated School District, and from performing the duties of such officers. The object of this suit was to contest the validity of the creation of consolidated district. See Complaint, Record, pages 2 to 8.

Defendants in Error interposed a Demurrer to the Complaint, and on August 23rd, 1919, an Order was entered sustaining the Demurrer. Record, page 9.

An appeal was taken to the Supreme Court of South Dakota, and on June 24th, 1920, the Supreme Court reversed the Order sustaining the Demurrer. In the opinion, the Court held that the emergency clause attached to the Act of 1919 was void, and hence the act did not go into effect until July 1st, 1919, and held that the proceedings had in March and April for the organization of the consolidated district were not authorized by any law then in force, and the attempted organization was wholly futile. Record, page 17. The case is reported in 43 S. D., page 166.

On June 26th, 1920, the Legislature passed a Curative Act; Section 2 of which reads as follows:

"That all acts and proceedings relating and pertaining to the organization and incorporation of any consolidated school district organized or attempted to be made, organized and incorporated under the provisions of Chapter 5 of the Revised Code of 1919, formerly Chapter 194, Laws of 1913, and acts amendatory thereof, are hereby legalized

and validated, as of the date when said consolidated districts were organized and incorporated under said laws, notwithstanding any irregularity or errors, omissions or defects, clerical in law or otherwise, in the organization and incorporation thereof, or any defect, ambiguity or omission, want or lack of power in the statute authorizing such organization and incorporation; and in all cases where a former independent school district and any part or all of any one or more other school district or districts have proceeded to organize as a consolidated district, all proceedings relating or pertaining thereto are hereby legalized and validated as of the date of any such organization or incorporation, notwithstanding any errors, omissions or defects in the organization or incorporation thereof, or any defect, ambiguity or omission, want or lack of power in the statute authorizing such organization and incorporation; and all of said consolidated school districts are hereby declared to have existed as independent consolidated school districts under the laws of the State of South Dakota since said organization and incorporation, and composed of the territory described and defined in the proceedings for consolidation and incorporation, and all acts of the officers of said state or county or school districts and all proceedings for bonding and taxation and for school purposes had therein relating to independent consolidated school districts, are hereby ratified, legalized and validated, notwithstanding any errors, omissions or defects, ambiguities, clerical or otherwise, or want or lack of power in the statutes, in the organization and incorporation of said districts."

The case was sent back to the Circuit Court, where on September 18, 1920, a Final Decree was entered granting the injunctions prayed for. Record, pages 20 and 21.

The Curative Act did not go into effect until ninety days after its passage and approval, or September 26th, 1920. Thereafter, and at the same term at which the Decree was entered, but after the Curative Act went into effect, the defendants ~~appealed~~ applied to the Court to be relieved from the injunction contained in the Decree of September 18th,

1920. The application was heard on November 1st, 1920, and on December 27th, 1920, a Decree was entered denying the application. Record, page 28.

Defendants appealed to the Supreme Court of South Dakota from the Order denying their application; and on January 31st, 1922, a decision was handed down by the Supreme Court of South Dakota reversing the Decree of December 27th, 1920, and sustaining the Curative Act of June 26th, 1920. The opinion of the Supreme Court appears on pages 29 to 39 of the Record.

The judgment entered in the Supreme Court contained the following:

> "That the Order of the Circuit Court within and for Kingsbury County, appealed from herein, be, and the same is hereby reversed, and the Circuit Court is directed to vacate the injunctional orders contained in its final judgment.
>
> "And it is further ordered, that this action be, and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court." Record, pages 29 to 30.

The Decision and Judgment of the Supreme Court was remitted to the Circuit Court of Kingsbury County, and filed therein on February 24th, 1922. The printed Record herein does not contain the Final Decree of the Circuit Court, except that the same is set forth in the petition for Writ of Error (Record, page 65), where it appears that on January 31st, 1922, the Circuit Court entered a Decree "that all that part of said judgment enjoining and restraining the defendant, as hereinbefore recited, be, and the same is hereby in all things vacated and set aside." It will be noted that the judgment for costs contained in the Decree, from which the injunction was stricken, was not vacated or disturbed. The Writ of Error in this proceeding was sued out to review the Decree entered by the Circuit Court of Kingsbury County, in which Decree was entered in obedience to the mandate of the Supreme Court of South Dakota, and the

Writ is not directed to the Supreme Court of South Dakota. Record, page 67.

Section 3170 of the Revised Code of South Dakota provides: "In all cases the Supreme Court shall remit its judgment or decision to the Court from which the appeal was taken, to be enforced accordingly; and if from a judgment, final judgment shall thereupon be entered in the Court below in accordance therewith, except where otherwise ordered."

BRIEF AND ARGUMENT

It is the contention of the Defendants in Error that the Writ should be dismissed because it is not directed to the highest Court of the State in which a decision could be had. The Supreme Court of South Dakota commanded the Circuit Court to vacate the injunction, and under Section 3170 of the Revised Code, last above quoted, the Circuit Court had no discretion in the matter.

In the case of the City of Mitchell vs. The Telephone Co., 27 S. D. 509, the Supreme Court of South Dakota had, on a previous appeal in the same case, directed the Court below to "enter judgment in favor of the plaintiff for the amount found due and unpaid to the Appellant by its Ninth and Tenth Findings of Fact." After the case reached the Court below, the Court permitted the defendant to amend its pleadings.

The Court said in its opinion on the second appeal, in 27 S. D., page 509, reading from page 510: "This was clearly error on the part of the trial Court." The Court decided that where a case has been remanded with directions to enter a judgment, "there was nothing for the trial Court to do but to render the judgment as directed, and defendant was not entitled after remand to interpose an amended answer." The Court says: "If appellant desired, upon retrial in the lower Court, to change the issues, it should have asked this court to return the cause without a direction that judgment be entered in favor of the plaintiff."

It is our contention that this judgment of the Supreme

Court directing and commanding the lower Court to vacate the injunctions, was the final judgment which determined the rights of the parties. That the Circuit Court, subject to such command, had no discretion in the premises, and had only the formal duty to perform of obeying the mandate of the Supreme Court. The judgment of the Supreme Court commanding the vacation of the injunctions was the final decree determining the rights of the parties; and as such, was subject to review by the Supreme Court of the United States. Tippecanoe County vs. Lucas, 93 U. S. 109; Mower vs. Fletcher, 114 U. S. 127; Atherton vs. Fowler, 91 U. S. 43.

This case is to be distinguished from those cases which are remanded to the lower Court for further proceedings in which any jurisdictional discretion is involved or may be exercised by the Circuit Court. In Clark vs. Kansas City, 172 U. S. 334, it is indicated that if the lower Court has power to make a new case by amending the pleadings, the judgment of the higher Court would not be final. It will be noted, however, in the case at bar, under the rule announced by the Supreme Court of South Dakota, as well as the statute, the Circuit Court had no power to do other than obey the command of the Supreme Court, and could not even permit an amendment of the pleadings.

It is significant in this case, that to get the Record before the Supreme Court of the United States, Plaintiffs in Error found it necessary to secure from the Clerk of the Circuit Court of South Dakota certified copies of the material portions of the Record. The Record so supplied consists of the Brief filed by these defendants in the Supreme Court of South Dakota, which contains the Assignment of Error (Record, page 39); the Clerk's certificate appearing on page 44. Also the Brief filed by Defendants in Error in the Supreme Court of South Dakota, which appears upon pages 45 to 58 of the Record; the certificate of the Clerk of the Supreme Court of South Dakota appearing on page 58.

From this it will be seen that it was necessary in order to present to the Supreme Court of the United States the matters at issue in the Supreme Court of South Dakota, the foregoing Records from that Court.

WRIT OF ERROR WAS SUED OUT FOR DELAY, AND THERE IS NO MERITORIOUS QUESTION PRESENTED.

The Supreme Court of South Dakota has held: "The Legislature in the exercise of its inherent plenary power may create, alter, or extend the boundaries of school districts at pleasure without consulting any of the inhabitants thereof, and although it may make taxation more burdensome, such as authorizing the formation of new districts or by creating new districts by consolidating two or more districts." Stephens vs. Jones, 24 S. D. 100; Nelson et al. vs. Lembcke et al., 178 N. W. 981.

"A state legislature having power to create special road and bridge districts which overlap may, consistently with due process of law, enact a statute which cures or validates the action of county commissioners in creating a special road and bridge district lying partly within another special road and bridge district, and legalizes and validates assessments theretofore made for the construction of roads and bridges in the newly created district." Charlotte Harbor & Northern Railway Company vs. W. G. Wells et al. Decided in the Supreme Court of the United States, October 16, 1922, and reported in Co-Op. Advance Sheets under date November 1st, 1922, on page 2.

The proceeding in this case to vacate the injunctional Order, is similar to that entertained by the Supreme Court of the United States in the case of Pennsylvania vs. The Wheeling & Belmont Bridge Co., 18th Howard 421. There are several opinions in the case, but the final Order in the bridge case dissolved the injunction. The bridge case also is an authority upon the right of the Legislature, or in that case of Congress, to pass a Curative Act which in effect superceded the injunction.

We also call attention to the case of Minneapolis, St. Paul & Sault Ste. Marie Railway Co. vs. Washburn Lignite Coal Company, 254 U. S. 370. The Court decides as follows, quoting from the syllabus: "A decision of the highest court of a state which rests upon grounds independent of

the only Federal question involved that would serve as the basis of a Writ of Error from the Federal Supreme Court, and which appeared to the state court to preclude any recovery, is not reviewable in the Federal Supreme Court on Writ of Error, where such independent grounds are broad enough to sustain the judgment, and, if not well taken, are not without substantial support, and, while possibly involving Federal questions, are not such as, since the Act of September 6, 1916, will support such a Writ of Error."

Political sub-divisions of the kind are always subject to the general laws of the state.

Such corporations are the mere creatures of the legislative will, deriving their existence from the legislature. Their officers are nothing more than local agents for the state. Commissioners of Laramie County vs. Commissioners of Albany County, 92 U. S. 307.

We therefore respectfully submit that the questions presented are questions that have been definitely settled and determined by the dcisions of the Supreme Court of the United States in the cases hereinbefore cited, and that there is no meritorious case or question calling for the decision of the Honorable Supreme Court of the United States.

Respectfully submitted,

T. H. NULL and MAX ROYHL, of Huron, So. Dakota,

Attorneys for the Defendants in Error.

Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 432.

J. H. HODGES, NICK HOFFMAN, WALTER ANDERSON, et al., *Plaintiffs in Error,*

vs.

G. T. SNYDER, C. W. WALKOW, A. O. WALKOW, ET AL., as Members of the Board of Education of the Purported Consolidated School District Named and Known as Erwin Independent Consolidated School District No. 1 of Kingsbury County, South Dakota, et al.,

Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF KINGSBURY COUNTY, NINTH JUDICIAL CIRCUIT, OF THE STATE OF SOUTH DAKOTA.

BRIEF OF PLAINTIFFS IN ERROR IN RESISTANCE OF MOTION TO DISMISS WRIT OF ERROR.

PHILO HALL,
WALLACE E. PURDY,
Brookings, South Dakota,
SAMUEL HERRICK,
Washington, D. C.,
Attorneys and of Counsel for Plaintiffs in Error.

Hayward Brief Company, 513 Fourth Ave. So., Minneapolis

INDEX.

TABLE OF CASES.

Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 432.

J. H. HODGES, NICK HOFFMAN, WALTER ANDERSON, E. H. ACKLEY, C. R. LEWIS, and H. M. MUSER, on Behalf of Themselves and of All Other Electors and Taxpayers Similarly Situated,

Plaintiffs in Error,

vs.

G. T. SNYDER, C. W. WALKOW, A. O. WALKOW, C. J. NOYES, and J. W. EARL, as Members of the Board of Education of the Purported Consolidated School District Named and Known as Erwin Independent Consolidated School District No. 1 of Kingsbury County, State of South Dakota, and C. A. JEPSON, Clerk, and J. W. KRUGER, Treasurer, of Said Pretended Consolidated School District, and M. L. McCARTY, County Superintendent of Schools of Kingsbury County, South Dakota,

Defendants in Error.

BRIEF OF PLAINTIFFS IN ERROR IN RESISTANCE OF MOTION TO DISMISS WRIT OF ERROR.

(Note: Figures in brackets refer to pages of printed Transcript of Record except where otherwise indicated.)

The first ground upon which defendants in error move to dismiss the writ of error herein is "because the decree from which the said writ of error purports to have been taken is the decree of an inferior court of the state of South Dakota, and because the final decree in said cause was entered in the Supreme Court of the state of South Dakota, and that the writ of error is not directed to said Supreme Court."

In our petition for writ of error herein we stated the practice on appeal from the Circuit Court to the Supreme Court of the state of South Dakota as follows:

> "That the Supreme Court of the state of South Dakota is the highest court in said state in which a final judgment could or can be had in this case, and the Circuit Court is the court of general original jurisdiction in cases at law and in equity, and that under the statutes, court rules and practice in said courts, the Supreme Court upon the expiration of twenty days from rendering its judgment and opinion sent its remittitur, the judgment, opinion and the record on appeal as aforesaid to the said Circuit Court from which the appeal was taken, for enforcement where such record now remains" (66).

We believe that counsel for defendants in error do not question this statement of the law and practice of the state courts in South Dakota.

Section 3170 Revised Code of South Dakota of 1919 is as follows:

> "Upon an appeal from a judgment or order, the Supreme Court may reverse, affirm or

modify the judgment or order, and as to any or all of the parties; and may, if necessary or proper, order a new trial; and if the appeal is from a part of the judgment or order, may reverse, affirm or modify as to the part appealed from. In all cases the Supreme Court shall remit its judgment or decision to the court from which the appeal was taken, to be enforced accordingly; and if from a judgment, final judgment shall thereupon be entered in the court below in accordance therewith, except where otherwise ordered. The clerk of the Supreme Court shall remit to such court the papers transmitted to the Supreme Court on the appeal, together with the judgment or decision of the Supreme Court thereon, within sixty days after the same shall have been made, unless the Supreme Court, on application of either of the parties shall direct them to be retained for the purpose of enabling such parties to move for a re-hearing. In case such motion for a re-hearing is denied, the papers shall be remitted within twenty days after such denial. The clerk of the Supreme Court shall in all cases, except when the order or judgment is affirmed, also transmit with the papers so returned by him a certified copy of the opinion of the Supreme Court."

Rule 19 of Supreme Court of South Dakota (Revised Code 1919 S. D. page 160), reads as follows:

"Unless otherwise ordered by the court or presiding judge, no cause heard on appeal shall be remanded until twenty days after decision. At the expiration of such period, if no petition for re-hearing has been filed or, if one has been filed, then upon its denial, the clerk shall forthwith remit the cause to the trial court unless otherwise directed or unless pro-

ceedings under rule 22 or 24 enlarge such time."

The Supreme Court of South Dakota has repeatedly held that after it remits the record back to the Circuit Court that the Supreme Court loses jurisdiction of the case and all further proceedings must be had in the lower court where the record remains.

Moe v. Goodroad (In re Satrang's Will), 186 N. W. 967.

Dempsey v. Billinghurst, 8 S. D. 86; 65 N. W. 427.

No copy of the record on appeal remains with the Supreme Court of South Dakota, except such portions more or less accurate and fragmentary, as may be printed by the parties in their briefs. The only documents there remaining are the printed briefs and the record of its own judgment and opinion. After the remittitur has been sent down to the Circuit Court all further proceedings in the case are had in the lower court wherein, pursuant to Section 3170 Revised Code, S. D. "final judgment" is entered in conformity with the mandate of the Supreme Court. Under the judgment of the Supreme Court in the case at bar no further proceedings were to be had in the lower court except the entry of final judgment, and the litigation was thereby concluded so far as the state courts were concerned (29-30). It will thus be observed that both the judgments of the Supreme and of the Circuit Courts possess elements of finality. The judg-

ment of the Supreme Court is controlling, and determines the issues in the case, and that of the Circuit Court, rendered in pursuance thereof, is treated and referred to in Section 3170 Revised Code S. D. as the "final judgment," and is there enforced. Counsel for defendants in error assume that the writ of error must in all cases be directed to the court whose decision is controlling in the case sought to be reviewed, regardless of where the record is lodged or where that judgment is to be enforced. We do not so understand the law. We believe that the function of the writ of error is to bring up the record from the court possessing it, to the court where it is to be reviewed, and that the purpose of the citation is to bring in, and notify, the parties of the proceedings for review, and that the proceedings under the writ of error herein are regulated by that part of the rule laid down in *Atherton v. Fowler*, 91 U. S. 143; 23 L. Ed. 265, 267 reading as follows:

> "If we know that the record is in possession of the inferior court and not the highest court, we may send there without first calling upon the highest court."

As said by this court in an opinion written by Mr. J. Story:

> "The judgment to be examined must be that of the highest court of the state having cognizance of the case, but the record of that judgment may be brought from any court in which it may be legally deposited, and in which it may be found by the writ."
>
> *Gelston v. Hoyt*, 3 Wheat. 246, 304; 4 L. Ed. 396.

This practice has been repeatedly affirmed by this Honorable Court.

Polleys v. Black River Improvement Co., 113 U. S. 81; 28 L. Ed. 938.

McDonald v. Comm. of Mass., 180 U. S. 311; 45 L. Ed. 542.

Rothchild v. Knight, 184 U. S. 334; 46 L. Ed. 573, 579.

The situation here is identical with that referred to in the case of *Polleys v. Black River Improvement Co., supra*, wherein the court said:

> "It appears, by the cases cited to us and by the course of proceedings in such cases in the Wisconsin courts, that the record itself is remitted to the inferior court and does not, nor does a copy of it, remain in the Supreme Court. Though the judgment in the Circuit Court was the judgment which the Supreme Court ordered it to enter, *and was in effect the judgment of the Supreme Court*, it is the only final judgment in the case, and the record of it can be found nowhere else but in the Circuit Court of La Crosse county.
>
> To that court, therefore, according to many decisions of this court, the writ of error was properly directed to bring the record here for review."

The Supreme Court of this state has held:

> "Upon the disposition of a cause by the Federal Court, if its determination is one which is final in its nature, *it may send its mandate either to the Supreme Court of the state or to such inferior court thereof as may have the custody of the records therein and be capable*

of carrying out the mandate of such court."
Simonson v. Monson (S. D.), 153 N. W. 1020.

The reason for including certified copies of the printed briefs on appeal to the State Supreme Court in the record herein, was to show that a federal question was raised in that court, the court's opinion not disclosing that fact suggested as the proper practice in *Mutual Life Ins. Co. of New York v. McGrew*, 188 U. S. 291, 311; 47 L. Ed. 480, 485.

We therefore believe that the first ground of the motion for dismissal of the writ of error is untenable.

The second ground of the motion of defendants in error for dismissal of the writ of error herein is that it "was taken for delay only and presented no substantial question for review."

This part of their motion necessitates our outlining our position in this case, in anticipation of our brief on the merits.

STATEMENT OF THE CASE.

This suit in equity was brought in June, 1919, in the Circuit Court of Kingsbury county, state of South Dakota by plaintiffs in error, tax-payers and school patrons in five rural school districts in the county of Kingsbury, South Dakota, to enjoin the defendants in error from exercising the functions of a consolidated school district and acting as officers thereof, from purchasing a site and erecting an expensive school building in the city of Erwin

(an independent school district) and from issuing the bonds of such purported consolidated school district, affecting the plaintiffs and their property, in the sum of $97,000.00 as was threatened to be done by the defendants. The complaint therein alleged several grounds for the injunction including the insufficiency of the petitions of the electors, fraud in the elections and more especially it was contended that under the statutes of South Dakota, a consolidated school district must be composed entirely of rural or common school districts, and must not include a city or independent school district (2-8). The defendants demurred to this complaint, one of the grounds of demurrer being that the complaint did not state facts sufficient to constitute a cause of action (8-9). The Circuit Court sustained the demurrer (9). Plaintiffs in error appealed to the Supreme Court of the state of South Dakota from this order and the Supreme Court reversed the ruling of the Circuit Court, basing its decision upon the ground that under the South Dakota statutes a consolidated school district could not include an independent school district, and held the proceedings for the organization of said consolidated school district and the issuance of bonds void (*Hodges v. Snyder*, 178 N. W. 575). In that opinion the court said:

> "That the attempt to organize the Erwin Consolidated School District was not authorized by any law then in force and that the attempted organization was wholly futile."

Nothing was left for the Circuit Court to do

but to enter judgment in conformity with the mandate of the Supreme Court, and after this remittitur was handed down, judgment was, on notice, duly entered by the said Circuit Court September 18, 1920, pursuant to said judgment and decision of the Supreme Court as follows:

> "Now therefore on the motion of Hall & Purdy, attorneys for plaintiffs, it is hereby ordered, adjudged and decreed that the above named defendants and each of them, and all persons acting by, through or under them or either of them in any manner are hereby permanently enjoined from proceeding further as a consolidated school district, and from in any manner assuming or undertaking to assume that the said purported Erwin Independent Consolidated School District No. 1 of Kingsbury county, South Dakota is in fact or law a consolidated school district and from in any manner interfering with the conduct of said school districts Nos. 31, 32, 34, 35 and 50 and the maintenance of schools therein, and from purchasing any site or erecting any school building for said purported consolidated school district and from issuing bonds in the sum of ninety-seven thousand dollars ($97,000.00) or any bonds whatsoever, purporting to be the obligations of said alleged Erwin Independent Consolidated School District No. 1 of Kingsbury county, South Dakota, and from advertising for bids therefor and from selling the same, and from conducting or attempting to conduct said alleged consolidated school district, and from acting or purporting to act as officers thereof.
>
> It is further ordered, adjudged and decreed that the proceedings had for the said consolidation of school districts and the attempt-

ed creation of said Erwin Independent Consolidated School District No. 1 of Kingsbury county, state of South Dakota, are null and void and that no such consolidated school district exists in fact or law and that the restraining provisions contained in the order to show cause issued by the court herein dated June 10th, 1919 are hereby continued in effect and made permanent.

It is further ordered and adjudged that the plaintiffs have and recover from the defendants and each of them their costs and disbursements herein to be hereafter taxed by the clerk of said court and inserted herein at the sum of 71.60 dollars" (20).

From which final judgment of the Circuit Court, no appeal was taken by the defendants in error (60). The said decision of the Supreme Court of South Dakota was rendered June 24, 1920, and the final judgment of the Circuit Court of Kingsbury county entered in pursuance thereof was rendered September 18, 1920 (20-21), and was filed and recorded in the office of the clerk of that court September 23, 1920 (21).

On June 26, 1920 at a special session of the legislature of the state of South Dakota a purported curative act was passed which by its terms purported to ratify all acts of school, county and state officers in the organization of consolidated school districts and the issuance of their bonds, which act is set forth in the printed transcript herein pp. 61-62. While by the terms of this act it contains an "emergency clause" purporting to make it effective immediately upon its approval June 26, 1920, yet

as a matter of law it did not go into effect until after the entry of the final judgment by the Circuit Court as aforesaid, to-wit: September 26, 1920, or ninety days after its approval, as conceded by counsel for plaintiffs in error in their brief herein (8). Subsequently and on or about November 1, 1920, an order to show cause procured by the defendants in error requiring plaintiffs in error to show cause why the Circuit Court should not make an order vacating, setting aside and nullifying the decree of injunction entered and made by said court in the above action dated September 18, 1920. Plaintiffs in error herein presented to said Circuit Court upon the hearing, certain written objections to the granting of said order to show cause, and to the granting of the relief sought thereby as follows:

"(Title.)

Come now the above named plaintiffs and object to the court setting aside, or nullifying the decree of injunction rendered herein September 18th, 1920, and duly filed and entered of record in the office of the clerk of the above named court September 23rd, 1920, for the following reasons:

I.

That the purported Curative Act, Chapter 47 of the Laws of the Special Session of 1920, did not become operative until September 26th, 1920, and after the entry of said judgment and decree pursuant of the decision of the Supreme Court rendered herein, dated June 24th, 1920, and the legislature was without power or authority to nullify or impair such decree or de-

prive these plaintiffs of their vested rights and interests thereunder.

II.

That said Special Act is repugnant to and in violation of the provisions of the Federal Constitution and the Constitution of the state of South Dakota, in that it seeks to deprive persons and taxpayers of property without due process of law and to impair the obligation of contracts and takes private property for public use without compensation.

III.

That said Special Act is unconstitutional and void in that it purports to validate acts of persons, regardless of regularity of proceedings or notice to tax payers, a majority vote or opportunity to be heard in the organization of consolidated school districts and issuance of bonds.

IV.

That such act is unconstitutional and void in that it purports to validate such proceedings and bonds although no legal authority whatever existed for such proceedings or issuance of such bonds and that the legislature was and is without power or authority to thus create corporations or authorize issuance of bonds regardless of notice to or opportunity to be heard by taxpayers affected thereby and not having authority so to do originally, it cannot ratify such unlawful acts.

V.

That the court is without jurisdiction to vacate such judgment and decree lawfully enter-

ed in the absence of fraud or mistake nor any of the recognized grounds for vacating judgments, and that it cannot be thus attacked by defendants, but if aggrieved thereby they had the right to appeal therefrom to the Supreme Court. That the decision of the Supreme Court herein is *res judicata* of the questions herein involved.

VI.

That the legislature is without power to validate acts by means of a curative statute, or otherwise, which it had not the power to enact originally, and that it did not have power originally to arbitrarily incorporate a consolidated school district, abolish and take away the property of existing school districts and issue bonds affecting tax payers, without notice to such tax payers or giving them an opportunity to be heard.

VII.

That the legislative department of government cannot trench upon or usurp the functions and powers of the judicial department by declaring acts to be valid which have been finally determined to be void by the Supreme Court. This would constitute a legislative reversal of a judicial decision, contrary to our Federal and State Constitutions and be repugnant to our theory and the fundamental principles of government.

Dated this 30th day of October, A. D. 1920.

Hall & Purdy,
Attorneys for Plaintiffs,
Brookings, S. D."

(26-27).

Thereupon said Circuit Court made an order

dated December 27th, 1920, denying the relief sought by the defendants in error therein (28). From such order the defendants in error herein took an appeal to the Supreme Court of the state of South Dakota, and on the 21st day of February, 1922, said Supreme Court rendered its judgment and opinion reversing the Circuit Court and directing it to "vacate the injunctional orders contained in its final judgment" (29-39). The said written objections so made by plaintiffs in error in the said Circuit Court, objecting to the vacation of the final judgment entered therein September 18, 1919, constituted a part of the record submitted to the Supreme Court of South Dakota on said appeal. In the brief of these plaintiffs in error upon said last appeal to the Supreme Court it was contended:

> "The judgment rendered by the Circuit Court herein in conformity with the decision of this court, became a final judgment before the alleged Curative Act in question became operative, therefore, if the act can be given the effect for which the defendants contend in this case, no final judgment of any court, even though under the express direction of the Supreme Court, will be immune from legislative reversal, and would make the legislature the court of last resort, instead of the Supreme Court" (49).

BRIEF AND ARGUMENT.

The rights which these plaintiffs as tax payers sought to protect by injunction herein were private and personal, and not public rights, and became

vested and were determined by final judgment in the highest court of the state prior to the taking effect of the Curative Act in question. Concerning such private rights so vested and adjudicated we believe that the rule stated by Mr. Cooley as follows is applicable:

> "Legislative action cannot be made to retroact on past controversies, and to reverse decisions which the courts, in the exercise of that undoubted authority have made, for this would be the exercise of judicial power."
>
> *Cooley Const. Lim.* (5th Ed. p. 113).
>
> *Denny v. Mattoon* (Mass.), 2 Allen 361; 79 Am. Dec. 784.
>
> *People v. Lufferty* (Ia.), 3 American Law Reports 447.
>
> *McManus v. Homaday*, 124 Ia. 267; 2 A & E. Ann. Cas. 237.
>
> *Charles Baumbach Co. v. Singer* (Wis.), 56 N. W. 873.
>
> *McCullough v. Virginia*, 172 U. S. 102; 43 L. Ed. 382.

Upon this point this court in the last cited case said:

> *"It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases."*

And we contend that such vested personal rights and immunities thus secured and determined by the court in favor of these plaintiffs are protected from invasion by legislative action by the Four-

teenth Amendment of the Constitution of the United States prohibiting the taking of property without due process of law. *Forbes Pioneer Boat Line v. Board of Commissioners*, decided by this court April 10, 1922, reported in Lawyers Ed. Advance sheet No. 13, p. 401.

Traux v. Corrigan, decided December 10, 1921, by this court and reported in Law. Ed. Advance Sheet No. 5, p. 132 (Jan. 16, 1922). In neither of the last cited cases had the rights of the plaintiffs been previously adjudicated, but both cases were for the protection of private rights and not public ones as in the Bridge cases.

The *Wheeling Bridge case*, 18 How. 421; 15 L. Ed. 435, cited by counsel for defendants in error, and also the *Clinton Bridge Case—Gray v. Chicago R. R. Co.*, 10 Wall. 454; 19 L. Ed. 969, are distinguishable from the case at bar and from the above cited cases, in that the former involved the assertion of a *public* right—the right of free navigation and the power of congress at any time to designate what is and what is not an obstruction—and the opinion of the court in the *Wheeling Bridge Case* clearly draws the distinction between the effect of a judgment finally determining *private* rights and one determining a *public* right of the nature therein involved in the following language:

> "But it is urged that the Act of Congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially as it

> respects adjudication upon the *private* rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it.
>
> The case before us, however, is distinguishable from this class of cases, so far as it respects that portion of the decree directing the abatement of the bridge. Its interference with the free navigation of the river constituted an obstruction of a *public* right secured by Acts of Congress."

The court further held therein that if the judgment had been one for damages (for breach of the plaintiffs' private rights), the subsequent Act of Congress could not have impaired it, and also held that insofar as the judgment rendered was of a private or personal nature, to-wit: for costs, that said Act did not affect it. The distinction thus drawn by the court by express language, is based upon the question of whether the right judicially determined is a private one—in which case the determination is "absolute"—or is a public one, such as the right of free navigation by the public, in which latter case it held that an individual asserting such public right could not be heard to urge that the Act of Congress in question was violative of *his* constitutional rights based on a prior adjudication of such public right. The distinction thus drawn by the court is not based upon the mere form of remedy—whether action at law or suit in equity—for compensatory or preventative relief—but, as we believe, is based upon the more substantial ground of the nature of the right asserted—

whether private, and therefore subject to constitutional protection, or public, and therefore not subject to such protection. This construction is further borne out by the allowance of costs—a private right—to the plaintiff in that suit.

We believe therefore that what was said by the court in the opinion relative to the Act of Congress overturning the previous judgment, was, and should be considered, as limited to judgments based upon public rights only, and not upon private ones.

The Wisconsin Supreme Court, in *Wisconsin Tel. Co. v. Kruger*, 90 N. W. 458 drew the distinction between the effect of a final judgment, as against subsequent legislative action, in a case involving the determination of private rights and public rights, and after quoting from the *Wheeling Bridge case* the portion of the opinion above quoted, that court said:

> "That was said on the theory that congress had the exclusive right to regulate interstate commerce and to establish post roads and provide for the transportation of the mails thereon. *In that case the legislation was sustained only in so far as it affected the rights of the public.*"

And in the case of *State ex rel. Vanden Houten v. Van Huse*, 97 N. W. 503 the Wisconsin Supreme Court distinguished between the effect of retroactive legislation upon cases still pending in court and those which had been determined by judgment before its enactment.

That the plaintiffs had substantial rights and

that they were of a personal and private nature, as school patrons and tax payers, is manifest from the allegations of the complaint (2-8) to which complaint the defendants demurred, thereby admitting the truth of the facts therein stated. In reversing the order of the Circuit Court sustaining the defendants' demurrer to the complaint, the Supreme Court of this state in its opinion (14) referred to the case of *Isaacson v. Parker*, 176 N. W. 653, and the same case on re-hearing 178 N. W. 139, decided a short time previously, for the reasons sustaining the plaintiffs' position in the case at bar. In *Isaacson v. Parker supra*, the court in effect held that cities would not be permitted by force of superior numbers to deprive surrounding school districts of their existing educational facilities, thereby compelling scholars to go great distances to attend the city schools, and subjecting tax payers in rural districts to contribute to the erection and support of such city school against their will. This is not an action brought by the rural school districts against the proposed consolidated school district, but it is an action brought by and on behalf of about one hundred residents, electors and tax payers of the five rural school districts, individually, against the persons purporting to act as officers of such pretended consolidated school district. It was the contention of the plaintiffs in their complaint, among other reasons, for asking for preventative relief:

> "(a) That all the officers conducting said election were residents and citizens of the said

> city of Erwin. (b) That the electors of said city of Erwin, a thickly populated district, forced the result of said election upon the said outlying rural districts against the will and without the consent of the latter and of the majority of the electors thereof, by reason of the greater number of electors in said city of Erwin, and that the statutes of this state concerning consolidated schools do not contemplate that a city can thus forcibly annex rural territory and erect a large and expensive school building in the city at the expense of said rural districts and compel the scholars in such rural districts to attend school in such city, going in many instances in the district complained of herein, a long and unreasonable distance to school and to be subjected to great inconvenience."

In short, these one hundred farmers of five common school districts desired to retain their five existing schools and protested against their confiscation and to being annexed to the city school of Erwin, and compelled to contribute to its erection and maintenance. We believe that these personal rights of the plaintiffs were as substantial and important to them, as were those of the plaintiffs which were vindicated by this Honorable Court in the recent cases of *Forbes Pioneer Boat Line v. Board of Commissioners supra*, and *Traux v. Corrigan supra*, and in addition thereto that such private and personal rights of these plaintiffs were vested in them by the final judgment of the highest court of this state, which held that upon the facts and the law, that the plaintiffs were entitled to

the relief sought in their complaint. And under the direction of the Supreme Court final judgment was entered in the Circuit Court of Kingsbury county, state of South Dakota September 18, 1920, enjoining the defendants "from proceeding further as a consolidated school district * * * and from in any manner interfering with the conduct of said school districts Nos. 31, 32, 34, 35 and 50 and maintenance of schools therein, and from purchasing any site or erecting any school building for said purported consolidated school district, and from issuing bonds in the sum of ninety-seven thousand dollars ($97,000.00), or any bonds whatsoever, purporting to be the obligations of said alleged Erwin Independent Consolidated School District No. 1, of Kingsbury county, South Dakota" (20).

The court in its opinion in *Isaacson v. Parker*, 176 N. W. 653, 655, said, concerning the plaintiffs' contention:

> "But in our opinion the strongest point against the construction contended for by respondents is that the consolidation of a rural district with an independent district will not tend to promote 'a better condition in rural schools' and will not 'increase the efficiency of the common school system.' The majority of the voters of the consolidated district will prevail. If a suitable school already exists in the independent district, there will be no outside building. The school children from the former rural district will be compelled to go to the city school. If a new building is built, it will be built where the majority says, viz.: in the city. That may, and probably will, result in better schooling for the pupil; but it will de-

> tract from, rather than increase the efficiency of rural schools. It will do away with them. If we mistake not the chief purpose of the consolidation act, it was to make the rural schools attractive and efficient, so that the children of the farms would be content to remain on the farms and not follow the lure of the city."

It is our contention that when the private rights of the plaintiffs, and their immunity from payment of said bonds, was determined and vested in them by final judgment, that such vested rights were thereafter immune from the effect of subsequent legislative action.

Maguir v. Henry, 84 Ky. 1; 4 Am. St. Rep. 182.

Skinner v. Holt, 9 S. D. 427 62 Am. St. Rep. 878.

McNichol v. U. S. Merc. Reporting Agency, 74 Mo. 457-471.

12 C. J. 828-829.

In re Handley's Estate 15 Utah 212; 62 Am. St. Rep. 926.

Town of Strafford v. Town of Sharon (Vt.), 4 L. R. A. 499.

Merchants Bank v. Ballou, 98 Va. 112; 81 Am. St. Rep. 715.

6 R. C. L. 319.

In the case of *Charlotte Harbor and Northern Railway Co. v. Wells*, cited by defendants counsel herein, unlike the case at bar, the suit of the plaintiffs was pending and undetermined at the time of the passage of the Curative Act there in question.

We concede that as a general proposition, in the

absence of constitutional restriction or intervening vested rights, the legislature may create, alter or extend the boundaries of school districts or create a new district by consolidation of others. But for the reasons hereinbefore given, this power could not be and was not exercised as to the proposed consolidated school district and bonds in question. By previous final judicial determination, rights and immunities had become vested in these plaintiffs. Not only did such rights and immunities thereby become vested and personal rights in favor of these plaintiffs, but by the same judgment, the subject matter thereof to-wit: the alleged proceedings for the organization of the consolidated school district and for the issuance of bonds in question was thereby withdrawn beyond the reach of the legislature, as to the validity of such proceedings.

Logically and necessarily a curative act in order to be effective must have something to cure—something to act upon. And likewise when proceedings have been declared by a court of competent jurisdiction to be null and void, they cease to exist in legal contemplation. Whatever effect the Curative Act in question may have had upon *other* proceedings for organization of consolidated school districts or issuance of *other* bonds, the proceedings for the organization of this particular consolidated school district in question and for the issuance of these proposed bonds have been declared null and void by a court of competent jurisdiction prior to the time that said Curative Act became a law. Those particular proceedings were then judicially

destroyed—eliminated—as though they had never occurred, and they were thereby placed beyond the power of legislative treatment or cure. No school building had ever been erected, nor bonds issued, and the purported proceedings for their erection and issuance were wiped out of existence, and nothing remained for the legislature to act on or confirm. A voidable action would be susceptible of ratification, but not a void or non-existent one. These proceedings were dead beyond the power of legislature resurrection. It is not uncommon for state legislative bodies to occasionally overlook our theory of governmental departments, and to usurp the prerogatives of the judiciary, but we have never known of one—unless it be the one in question—that went still further and also undertook to exercise a power reserved by divinity.

This brief in resistance to the motion of the defendants in error is of course not designed as a complete argument on the merits, but simply sufficient to show that there are substantial grounds for suing out the writ of error herein, and that it was not sued out merely for the purpose of delay.

Wherefore we respectfully submit that the motion should be denied.

PHILO HALL,
WALLACE E. PURDY,
Brookings, South Dakota,
SAMUEL HERRICK,
Washington, D. C.,
Attorneys and of Counsel for Plaintiffs in Error.

HODGES ET AL. *v.* SNYDER ET AL., AS MEMBERS OF THE BOARD OF EDUCATION OF THE ERWIN INDEPENDENT CONSOLIDATED SCHOOL DISTRICT NO. 1, OF KINGSBURY COUNTY, SOUTH DAKOTA, ET AL.

ERROR TO THE CIRCUIT COURT OF KINGSBURY COUNTY, NINTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH DAKOTA.

No. 432. Motion to dismiss or affirm submitted February 26, 1923.—Decided April 9, 1923.

1. Where, under the local practice, the original papers sent to the State Supreme Court as the record on appeal are remitted by that court with copies of its judgment and opinion to a lower court, without retaining a copy of such record, a writ of error from this Court to review the judgment of the State Supreme Court is properly directed to the lower court in which the record then is found. P. 601.
2. The right of a taxpayer in a decree enjoining the maintenance of an illegal school district and issuance of bonds therefor, is not private but public in character; and its loss through an act of the legislature validating the district but not affecting his right to costs, does not deprive him of property without due process of law. P. 601.

45 S. Dak. 149, affirmed.

ERROR to review a judgment of the Supreme Court of South Dakota reversing, except as to costs, a decree of the State Circuit Court (to which the record was remitted), which permanently enjoined the defendants in error from maintaining a consolidated school district and issuing bonds therefor.

Mr. Samuel Herrick, Mr. Philo Hall and *Mr. Wallace E. Purdy* for plaintiffs in error.

Mr. T. H. Null and *Mr. Max Royhl* for defendants in error.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The defendants in error move to dismiss the writ of error or affirm the judgment.

1. The ground of the motion to dismiss is that there is want of jurisdiction because the writ is not directed to the Supreme Court of the State. It was sued out to review a final judgment of that court reversing, on appeal, an order of the Circuit Court, and remanding the cause with direction to vacate the same. Under the local practice the original papers that had been transmitted to the Supreme Court as the record on the appeal, were remitted to the Circuit Court, with copies of the judgment and opinion of the Supreme Court (Rev. Code, S. Dak., 1919, § 3170); no copy of such record being retained by the Supreme Court. The rule of practice has been long established that in such case, in order to bring up the record which is essential to a review of the judgment of the appellate court, the writ of error is properly directed to the lower court in which the record is then found. *Gelston* v. *Hoyt*, 3 Wheat. 246, 304, 335; *McGuire* v. *Commonwealth*, 3 Wall. 382, 386; *Atherton* v. *Fowler*, 91 U. S. 143, 148; *Polleys* v. *Black River Co.*, 113 U. S. 81, 82; *McDonald* v. *Massachusetts*, 180 U. S. 311, 312; *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197, 200 (involving a similar writ of error to another circuit court of South Dakota); and other cases therein cited. Hence the motion to dismiss is denied.

2. The ground of the alternative motion to affirm the judgment of the Supreme Court is that the writ was taken for delay only and presents no substantial question for review. It should be granted if the questions on which the decision depends are so wanting in substance as not to need further argument. Rule 6, § 5; *Missouri Pacific Ry. Co.* v. *Castle*, 224 U. S. 541, 544; *Chicago, Rock Island & Pacific Ry. Co.* v. *Devine*, 239 U. S. 52, 54; *City of Boston* v. *Jackson*, 260 U. S. 309.

A single question is presented, which arises as follows: The plaintiffs in error, as resident taxpayers, filed a complaint in the Circuit Court challenging the validity of a consolidated school district which had been organized by

the merger of several smaller districts, and praying that the defendants in error, as its officers, be enjoined from further maintaining schools or erecting school buildings therein, or issuing bonds thereof. The Supreme Court, on an appeal from the Circuit Court, held that the attempted organization of the consolidated district "was not authorized by any law then in force . . . and was wholly futile" (43 S. Dak. 166, 176), and entered judgment remanding the cause for further proceedings in accordance with its decision. The legislature thereupon passed a curative act legalizing and validating all proceedings relating to the organization of any consolidated school district attempted to be made as this had been, as of the date when such district was organized. Laws S. Dak., Spec. Sess., 1920, c. 47. Before this curative act went into effect the Circuit Court, in accordance with the decision of the Supreme Court, entered judgment adjudging the invalidity of the consolidation, permanently enjoining the defendants from conducting the consolidated district, as prayed in the complaint, and awarding costs to the plaintiffs. At a later day of the term, after the curative act had gone into effect, a motion by the defendants to set aside this injunction was denied. Thereafter, on a second appeal, the Supreme Court held that the curative act had validated the defective organization of the consolidated district (45 S. Dak. 149), and entered the judgment now sought to be reviewed, reversing the order of the Circuit Court granting the permanent injunction and remanding the cause with direction to vacate so much of its judgment as awarded such injunction; but not reversing its judgment as to costs.

The plaintiffs in error concede that the legislature, in the general exercise of its inherent power to create and alter the boundaries of school districts, may create new districts by the consolidation of others. *Stephens* v. *Jones*, 24 S. Dak. 97, 100. And they likewise recognize that, since the legislature had the power to ratify that

which it might have originally authorized, there would have been no violation of due process if the curative act had been enacted and become effective before any adjudication had been made in the pending litigation as to the invalidity of the consolidated district. *United States* v. *Heinszen & Co.*, 206 U. S. 370, 386; *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226, 232; *Charlotte Harbor & Northern Ry. Co.* v. *Welles*, 260 U. S. 8. And see, generally as to giving effect to acts passed *pendente lite* but before the hearing, *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 331; *Mills* v. *Green*, 159 U. S. 651, 656; and *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 464.

Their sole contention is that as the curative act was not enacted until after the Supreme Court had decided, on the first appeal, the consolidated district was invalid, and did not go into effect until after the Circuit Court had entered judgment adjudging its invalidity and enjoining the defendants from further conducting its affairs, it deprived them, as applied by the Supreme Court, without due process, of the private property rights which had been vested in them under these adjudications.

It is true that, as they contend, the private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation. *Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. 421, 429; *The Clinton Bridge*, 10 Wall. 454, 463; *United States* v. *Klein*, 13 Wall. 128, 146; *McCullough* v. *Virginia*, 172 U. S. 102, 124 (in which the repealing act was passed after judgment by the trial court).

This rule, however, as held in the *Wheeling Bridge Case*, does not apply to a suit brought for the enforcement of a public right, which, even after it has been established by the judgment of the court, may be annulled by subsequent legislation and should not be thereafter enforced; although, in so far as a private right has been incidentally

established by such judgment, as for special damages to the plaintiff or for his costs, it may not be thus taken away. *Pennsylvania* v. *Wheeling Bridge Co., supra*, pp. 431, 439. This case has been cited with approval in *The Clinton Bridge, supra*, p. 463 (likewise involving a public, as distinguished from a private, right of action), *United States* v. *Klein, supra*, p. 146, *Stockdale* v. *Insurance Companies, supra*, p. 332, and *Mills* v. *Green, supra*, p. 655. And so a judgment for the restitution of taxes collected under the ostensible authority of a general statute will be reversed when, after the rendition of such judgment, a statute has been passed legalizing and ratifying such taxation. *Rafferty* v. *Smith, Bell & Co., supra*, p. 232.

In the *Wheeling Bridge Case*, as in the *Clinton Bridge Case*, the public right involved was that of abating an obstruction to the navigation of a river. The right involved in the present suit, of enjoining the maintenance of an illegal school district and the issuance of its bonds, is likewise a public right shared by the plaintiffs with all other resident taxpayers. And while in the *Wheeling Bridge Case* the bill was filed by the State, although partly in its proprietary capacity as the owner of certain canals and railways (9 How. 647, 648), the doctrine that a judgment declaring a public right may be annulled by subsequent legislation, applies with like force in the present suit, although brought by individuals primarily for their own benefit; the right involved and adjudged, in the one case as in the other, being public, and not private.

The judgment of the Supreme Court in this case affected merely the public right involved—the plaintiffs' judgment for costs not being impaired,—and was clearly in accordance with the doctrine of the *Wheeling Bridge Case*. And since the question does not require further argument, the alternative motion of the defendants in error is granted, and the judgment is

Affirmed.